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THE

AMERICAN AND ENGLISH

RAILROAD CASES.

A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA AND ENGLAND.

EDITED BY

WILLIAM M. McKINNEY.

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THE

AMERICAN AND ENGLISH
RAILROAD CASES.

VOLUME XLIX.

CHICAGO & GRAND TRUNK R. Co.

v.

WELLMAN.

(*143 United States, 339.*)

Regulation of Rates—Power of Legislature.—The legislature of a state has the power to fix rates for transportation which may be charged by a railroad company, and the extent of judicial interference is protection against unreasonable rates.

Maximum Passenger Rates—Constitutionality of Michigan Statute.—The lower court did not err in refusing to instruct the jury that the act of the legislature of Michigan, of June 28, 1889, fixing the maximum passenger rate of two cents per mile on all railroads whose gross yearly passenger earnings exceed $3000, was unconstitutional in its application to the road in question, merely upon an agreed statement, in a friendly suit to test the constitutionality of such act, showing that the income of the company, at the rates existing before the enactment of such statute, was entirely consumed by operating expenses and fixed charges, and the testimony of two of its officers that an increase of freight rates would diminish the income of the road, there being no evidence to show that a reduction in passenger rates would not increase the travel sufficiently to equalize the earnings, nor of what the operating expenses consisted.

Friendly Suit to Test Constitutionality of Statute.—Whenever, in the pursuance of an honest antagonistic assertion of rights, there is presented a question involving the validity of an act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must determine whether the act be constitutional or not; but it never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Wellman *v.* Chicago & Grand Trunk R. Co. 83 Mich. 592, 45 Am. & Eng. R. Cas. 249, affirmed.

In error to the Supreme Court of the state of Michigan.

In 1889 the legislature of the state of Michigan passed an act, No. 202 of the Public Acts of that year, pages 282 and 283, by which, among other things, section 3323 of Howell's

Statutes, being a part of the railroad law of that state, was amended. So far as affects the matters in controversy here, it is enough to quote from the ninth paragraph, referring to the powers and liabilities of railroad companies. That is as follows:

"*Ninth.* To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of $3,000 per mile of road operated by said company, two cents per mile; and for all companies the earnings of whose passenger trains, reported as aforesaid, were over $2,000 and less than $3,000 per mile of road operated by said company, two and a half cents per mile; and for all companies whose earnings, reported as aforesaid, were less than $2,000 per mile of road operated by said company, three cents per mile."

Prior thereto the regular fare charged on plaintiff in error's road from Port Huron to Battle Creek was $4.80, the distance being 159¾ miles. On the very day on which the law took effect, to-wit, October 2, 1889, the defendant in error, plaintiff below, went to the defendant's office in Port Huron, and tendered $3.20 for a ticket from that place to Battle Creek, which was refused. Thereupon he brought this action in damages, to which the railroad company promptly answered; and on November 22, 1889, less than two months from the time the law went into effect, the case was tried, and a verdict and a judgment entered in favor of the defendant in error for the sum of $101, an amount sufficient to take the case to the higher court. On the trial it was agreed that the railroad company's earnings on its passenger trains for the year 1888 exceeded $3,000 per mile; that its capital stock was $6,600,000, and had been fully paid in; that its bonded debt was $12,000,000, one-half bearing 6 per cent. and the other half 5 per cent. interest, payable semi-annually; that the capital stock and mortgage debt represented an actual amount paid into the corporation; that the railroad property was at the time worth more than the capital stock and mortgage debt; and that, in addition to the mortgage debt, there was a floating debt of the amount of $896,906.40. Further, the following tabulated statement of the earnings

and expenses for the year 1888 was admitted to be correct:

(7) That the total earnings and income of the defendant from all sources for the year 1888 was		$3,228,338 17
Of this amount there was received from passenger traffic the sum of	$1,065,502 94	
And from freight traffic the sum of	2,160,180 23	
From miscellaneous sources	2,655 00	
		$3,228,338 17
(8) That defendant's operating expenses for the year 1888 were	$2,404,516 54	
The interest paid on its bonds was	661,335 36	
Other necessary expenses, including interest on part of the unfunded debt, rental of cars, tracks, etc.	150,305 61	
		$3,216 157 51
(9) That, in addition to the foregoing expenses defendant paid during the year 1888 from its earnings, on account of interest on bonds not paid in previous years		12,257 94
		$3,228,415 45

In addition to this agreed statement of facts, two witnesses were called, one the traffic manager and the other the treasurer of the plaintiff in error. Their testimony was substantially that, in view of the competition prevailing at Chicago for through business, it was impossible to increase the freight rates then charged by the company, because it would throw the volume of business into the hands of competing roads. Upon such agreed statement and testimony, and that alone, the railroad company asked an instruction that the act of 1889, referred to, was unconstitutional. The court refused this instruction, and an exception to the refusal to give this instruction was the solitary one taken on the trial. The court proceeded to charge the jury that the act in question was valid, and that the plaintiff was entitled to a verdict and judgment by reason of the failure of the defendant to comply with its provisions. To this charge no exceptions were taken, and the case went to the supreme court of the state on the single exception above stated. That court sustained the ruling of the trial court, and affirmed its judgment, (83 Mich. 592, 45 Am. & Eng. R. Cas. 249,) to reverse which judgment the railroad company sued out a writ of error from this court.

E. W. Meddaugh and *Geo. F. Edmunds*, for plaintiff in error.

Wm. T. Mitchell, for Wellman.

A. A. Ellis, Atty. Gen., for State of Michigan.

BREWER, J.—The single question presented on the record is whether the trial court, on the facts presented, erred in refusing to instruct, as a matter of law, that the act of 1889 was unconstitutional. It will be noticed that that act does not interfere with the rates of freight; it simply regulates passenger fares; also that there was no agreement that the freight rates could not be so changed as to increase the revenues therefrom. There was in evidence the opinion of two gentlemen, doubtless well informed and worthy of credit, that an increase of freight rates was inexpedient and futile, and would tend to diminish, rather than increase, the income from freight. But the question was not submitted to the jury as to whether they believed that an increase of freight rates would work a reduction of the income from freight, nor even whether they believed that a reduction of the passenger tariff between Battle Creek and Port Huron would not so increase the travel as to increase the earnings therefrom; but the court was asked to peremptorily charge the jury that the law fixing the passenger rate was unconstitutional. In other words, the instruction asked amounted to this: that, as matter of law, the opinion of these two witnesses as to the effect of raising the freight tariff upon the earnings was conclusive; that, as like matter of law, the reduction of passenger tariffs would not so increase the amount of passenger business as to increase the revenues, but would, on the contrary, diminish the earnings therefrom; that such reduction would operate to so far diminish the earnings of the road as to prevent the payment of operating expenses and fixed charges; and, therefore, that the act was unconstitutional in its application to this company; or else that the legislature had no power in respect to the matter, and that an act prescribing maximum rates was necessarily unconstitutional, although the rates authorized might be so high as to enable every company to pay therefrom all expenses and large dividends to stockholders.

Instruction as to constitutionality of act.

In this connection it is worthy of note that while, by the agreed statement, the previous passenger rate between Port Huron and Battle Creek was $4.80, which was the same rate per mile that defendant uniformly charged all other persons for transportation upon its road, yet from the report of the defendant, made to the State of its business for the year 1888, and which we are invited by its counsel to examine, it appears that the average rate of fare per mile for all passengers was $.01.62, being .38 less than the maximum rate fixed by the act in question.

Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and therefore the earnings? At any rate, must the court assume that it has no such effect, and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily dimishes the earnings? If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury, and decline to assume that the effect is as claimed? There can be but one answer to these questions. If the contention be that the Legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer to the long series of cases in this court in which the contrary has been decided. The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates. Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, 23 Am. & Eng. R. Cas. 577; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285.

The supreme court of Michigan, in passing upon the present case, felt constrained to make this observation:

"It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the Attorney General, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest. In the stipulation of facts, or in the taking of testimony in the court below neither the Attorney General nor any other person interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, under our view of the case, is not of material inquiry."

Friendly suit to test validity of act.

Counsel for plaintiff in error, referring to this, does not question or deny, but says: "The Attorney General speaks of the case as evidently a friendly case, and Justice Morse,

in his opinion, also so speaks of it. This may be conceded; but what of it? There is no ground for the claim that any fraud or trickery has been practised in presenting the testimony."

We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an appeal from the Legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the Legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the Legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

These observations are pertinent here. On the very day the act went into force the application for a ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered, not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries—fifty to one hundred thousand dollars to the president, and in like proportions to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable

dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this; that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be mislead into doing greivous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure, of all material facts. Judgment affirmed.

Authority of State Legislature to Fix the Rates of Transportation. Reference to the numerous decisions and notes on this question are collected in the note to the case of Chicago, M. & St. P. R. Co. *v.* State of Minnesota (U. S.) 42 Am. & Eng. R. Cas. 316. There is nothing in the above decision of the United States Supreme Court to indicate that it is not in entire harmony with the trend of the later authorities on this subject.

Special Legislation Regulating Rates—Failure of Company to Accept Provisions of Constitution.—Article 15, Section 7, of the constitution of Colorado provides that no railroad company in existence at the time of the adoption of the constitution shall have the benefit of any future legislation without first filing with the Secretary of State an acceptance of the provisions of the constitution. The Colorado Central R. Co., incorporated in 1865 under a special charter, which provided that the Legislature might, after twenty-five years, prescribe the rates to be charged for transportation, never accepted the provisions of the constitution. *Held*, that it is not entitled to protection under the constitutional provision against special legislation, and a law prescribing freight and passenger rates for the road, is constitutional, *In re.* Constitutionality of Senate Bill No. 69, 15 Colo. 601.

Reasonableness of Carrier's Charges—Opinion of Witnesses.—On the question of the reasonableness of the charges made by a railroad company the opinion of a witness who has no knowledge or skill in the adjustment of freight charges is not admissible. Little Rock & Ft. S. R. Co. *v.* Bruce (Ark.. Oct. 31, 1891), 17 S. W. Rep. 363.

Unreasonableness of Charge for Hauling Brick—Comparison with Rates for Hauling Stone.—In Little Rock and Ft. S. R. Co. *v.* Bruce (Ark. Oct. 31, 1891), 17 S. W. Rep. 363, it was held that where a railroad company's rate for hauling brick was eight cents per hundred pounds and but four and a half cents for hauling stone, this is a circumstance which the jury may consider in determining whether the charge for brick is unjust or unreasonable. The court said: "What weight should be given to that circumstance was for the jury to say, in the light of all the evidence in the cause, and the court was not authorized to say that it was sufficient on the one side or insufficient on the other. If the carrier placed stone in a special class and fixed for it a special rate for reasons deemed sufficient by

it, it cannot be said as a matter of law that this was an unjust or unreasonable discrimination against the plaintiff and other shippers of brick. What considerations may properly enter into the determination of the justness and reasonableness of a rate we shall not attempt to define or outline. The circumstance relied upon is one, and the competency of others may be determined as cases arise that present them. See 8 Am. & Eng. Enc. Law, art. 'Freight,' p. 900."

Overcharge on Freight—Sufficiency of Notice Before Bringing Action.—The Texas statute (Sayles' Civil St. art. 4258*b*, § 10,) provides that penalties for overcharges on freight shall not be recoverable unless the party aggrieved shall give notice thereof in writing "to the railway company, or to the agent demanding or receiving the same." *Held*, that a notice which was delivered to the successor of the local agent who received the overcharge, and which failed to give data from which the record of the shipment could be found on the company's books, was insufficient. Sabine & & E. T. R. Co. *v.* Cruse (Tex. Feb. 19, 1892), 18 S. W. Rep. 755.

FITZGERALD *et al.*

v.

GRAND TRUNK R. CO.

(Vermont Supreme Court, May 5, 1891.)

Interstate Commerce Act—Pre-existing Contract for Rebates—Vested Rights.—An agreement by a railroad company to allow a particular shipper a rebate on freight charges, is invalid at common law; and although such agreement existed prior to the passage of the Interstate Commerce Act, it imposed no obligation which such act could either impair or destroy. The Interstate Commerce Act did not, therefore, in its operation upon such a pre-existing contract, disturb any vested right. The parties to a contract concerning interstate transportation are considered to have made their agreement with the understanding that changes in the law applicable to them might be made by Congress.

EXCEPTIONS from Essex County Court.

Assumpsit to recover a rebate of freight. Judgment for defendant, and plaintiffs except.

L. H. Thompson, for plaintiffs.

Ossian Ray and *Geo. N. Dale*, for defendant.

POWERS, J.—The agreed facts, in substance, are that prior to the passage of the interstate commerce act the defendant promised to pay the plaintiffs a rebate of $6 upon each of the 170 car-loads of lumber which the plaintiffs were to deliver to the defendant for transportation from Island Pond to points in Massachusetts; and that the usual charges made to all shippers for such freight to such designation was $38 per car-load; that prior to April 5, 1887, (the day on which the interstate commerce act took effect,) the plaintiffs had delivered 73 car-loads for trans-

Case stated.

portation as aforesaid, and after that date, had delivered the remaining 97 car-loads, all of which the defendant had carried to its destination; that the defendant has paid the $6 rebate to the plaintiffs on the 73 car-loads, and this suit is brought to recover such rebate on the 97 car-loads. The plaintiffs have in all respects fully performed their contract, and the sole question is, can they recover the rebate on the lumber delivered for transportation according to the contract, after said April 5th? It was suggested in argument that it did not affirmatively appear but that the $6 rebate was allowed to all other patrons of the defendant shipping lumber to the same points, and so no discrimination was made in the contract in the plaintiffs' favor. But this is not the fair construction of the agreed facts, and the counsel on both sides have argued the case upon the theory that this rebate was a favor and advantage given the plaintiffs, and not enjoyed by other patrons.

Many sound reasons might be urged in support of the proposition that congress, upon those principles of justice and equity which underlie all law, cannot pass a law which will destroy or impair the obligation of existing contracts, except in bankruptcy and other instances specially enumerated in the constitution. The federal constitution expressly prohibits the passage of such laws by the states, but is silent respecting the power of congress so to do. But, whatever may be said upon that question, it is not involved in this case.

Right of congress to impair obligation of contract.

The agreed case is that, "unless the plaintiffs' right to recover is barred" by the interstate commerce act, the plaintiffs are to recover. This right of recovery is not barred if congress, in the passage of the interstate act, exceeded its power. It exceeded its power if it impaired the obligation of an existing contract. This is the syllogism that the argument upon this branch of the case is reduced to. The obligation of a contract in law is that element of duty or promise which a party can be compelled to perform. If performance cannot be compelled, there is no legal obligation in the contract. The contract in question, as it stood when made and down to April 5, 1887, is to be tested by the principles of the common law. At common law, common carriers were held to be persons who exercised their calling for the public good, upon equal terms, and with the same facilities, to all their customers. They could not lawfully exercise their calling by granting advantages to one customer which they denied to another, but were held to the duty of serving all alike. Their calling is one public

Contract for rebate invalid.

in its nature, and the common law exacted of them a strict impartiality in their dealings with the public. If the plaintiffs could transport their lumber to market for $6 per carload less than their neighbors, they would very soon have a monopoly of the business. Many cases might be cited to show that, at common law, all such special terms and favoritism are illegal. Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 407, is a representative case, in which BEASLEY, C. J., states the doctrine of the common law with great clearness and force. See, also, Audenried *v.* Philadelphia & R. R. Co., 68 Pa. St. 370; McDuffee *v.* Portland & R. R. Co. 52 N. H. 430; New England Express Co. *v.* Maine Central R. Co., 57 Me. 188; Pierce, R. R. 498.

This contract, then, at the common law, had no legal binding force, so long as it was executory,—no obligation which could be enforced, and therefore no obligation which the interstate commerce act could either impair or destroy. The interstate act, therefore, did not, in its operation upon this contract, disturb any vested rights, because no legal rights were vested when the contract was made. So long as the parties to the contract executed it, each was safe from any liability to the other by reason of such performance. In such cases the law leaves the parties just where they leave themselves.

In this case it is to be noted that the contract called for a transportation of the lumber through three states. Such carriage, therefore, is commerce between the states, within the meaning of article 1, § 8, of the federal constitution. Such commerce is solely regulated by congress, and, when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority. Cooley, Const. Lim. 284,574; Thorpe *v.* Rutland & B. R. Co., 27 Vt. 140; Odgen *v.* Saunders, 12 Wheat. (U. S.), 214; State *v.* Holmes, 38 N. H. 225. The power to regulate commerce between the states is one given expressly in the constitution to congress. The interstate act was called into being by reason of the making of contracts like the one at bar. Unjust discrimination was one of the chief evils in transportation which congress attempted to end by this act, and we see no reason why the act could not

No vested right disturbed.

as properly put an end to a contract already working the mischief as to prohibit the making of one in the future. The case, then, comes to this. The plaintiffs seek to enforce a contract which is prohibited by law. The doctrine is elementary that, whenever the plaintiff is compelled, in order to make out his case, to show the illegal contract, he cannot recover. Here the rebate of $6 is the illegal feature of this contract. This rebate is the precise thing sued for. The plaintiffs are compelled to prove that the defendant made an illegal promise to pay as the gist of their right to recover. Such promise is not enforceable. Judgment for defendant affirmed.

Effect of Interstate Commerce Act on Pre-existing Contracts.—A shipper cannot recover rebates stipulated for in a contract, in violation of the second section of the interstate commerce act, although such contract was entered into prior to the passage of such act. Bullard *v.* Northern Pac. R. Co., 10 Mont. 168, 45 Am. & Eng. R. Cas. 234. The fact that the statute renders such pre-existing contracts illegal, does not make it an unconstitutional enactment. Kentucky & Indiana Bridge Co. *v.* Louisville & N. R. Co. (I. C. C.), 34 Am. & Eng. R. Cas. 630.

Illegal Discrimination by Payment of Rebates.—The payment by a common carrier, secretly of a rebate to certain shippers, constitutes an unjust discrimination against others shipping the same class of goods, under the same conditions, at the regular rate, and is illegal at common law. Cook *v.* Chicago R. I. & P. R. Co., 81 Iowa 551, 45 Am. & Eng. R. Cas. 291, Cleveland C. C. & I. R. Co. *v.* Closser, 126 Ind. 348, 45 Am. & Eng. R. Cas. 275; Baylis *v.* Kansas Pac. R. Co. (Colo.), 40 Am. & Eng. R. Cas. 42, and cases cited in note, 55; Root *v.* Long Island R. Co., (N. Y.), 40 Am. & Eng. R. Cas. 55; Indianapolis D. & S. R. Co. *v.* Erwin, (Ill.), 27 Am. & Eng. R. Cas. 8.

Agreement for Rebate—Parol Evidence to Vary Terms of Bill of Lading.—In Louisville & Nashville R. Co. *v.* Fulgham, 91 Ala. 555, it was held that a bill of lading, when executed and delivered, becomes the sole expositor of the terms of the contract between the parties, and its terms cannot be varied by proof of a verbal agreement to allow or refund a rebate; but a modification of this principle gives effect to a general order published and posted by the carrier, allowing reduced rates for certain classes of freight to be used for particular purposes, directing the regular rates to be first paid, and promising to refund the overcharge on application.

Special Rates in Aid of Industrial Enterprises—Agreement to Allow Rebate to Miller.—The Alabama statute allows railroad companies to give special reduced rates to any person or corporation "to aid in the development of any industrial enterprise in this state" (Code, § 1161); and a railroad company, in the exercise of this power, having published and posted notice of special rates for the transportation of coal "used exclusively for manufacturing purposes," a miller engaged in the business of making meal out of corn is entitled to claim the reduced rate on the coal used by him. Louisville & Nashville R. Co. *v.* Fulgham. 91 Ala. 555.

Discrimination in Lumber Rates—Like Quantities and Kind.—Two carloads of lumber need not be exactly of the same weight or dimensions, in order to make a charge of one rate per 100 pounds to the shipper of one, and another rate to the shipper of the other an unjust discrimination under the Texas statute, it being necessary only that the quantities shall be "like." And the fact that the boards of one shipper are beveled on one

edge and are prepared for being put together as troughs, and are denominated "knock-down troughs," does not justify a railroad company in giving one shipper a freight rate less than that charged another shipper of ordinary lumber. New York, T. & M. R. Co. *v.* Gallaher (Tex. Feb. 24, 1891), 15 S. W. Rep. 694.

OSBORNE

v.

CHICAGO & NORTHWESTERN R. CO.

(*United States Circuit Court, S. D. Iowa, C. D., November 9, 1891; 48 Fed. Rep. 49.*)

Interstate Commerce Act—Construction of Long and Short Haul Provision.—In an action by a shipper of grain against a railroad company, to recover damages for an alleged violation of the fourth section of the interstate commerce act, which provides that a common carrier shall not charge a greater compensation for the transportation of a like kind of property, under substantially like circumstances, for a shorter than a longer distance over the same line, in the same direction, the shorter be included in the longer distance, the court charges the jury as follows:

(1.) That the defendant cannot justify itself on the ground that the rate complained of is fixed by a joint tariff agreement with other roads.

(2.) That the fact that the rate complained of results from the selection of different points on the line as a basis for competing rates, so as to charge one rate over one part of the road and a different rate over another part, is no defense.

(3.) That the defendant cannot claim that it was justified in making the greater charge for the shorter haul, by reason of the existence of a secret cut rate among competing roads, since the power of determining whether a railroad company is relieved from the operation of the fourth section of the interstate commerce act, lies solely with the interstate commerce commission.

(4.) That whether the circumstances and conditions under which the charge was made were "substantially similar," is a question for the jury.

(5.) That the measure of damages is the excess of the rate charged for the shorter haul, over that charged for the longer haul, multiplied by the number of hundred pounds shipped by the plaintiff.

(6.) That although the defendant has shared the illegal charge with another road under a joint tariff agreement, it is liable for the full amount of the damages.

(7.) That it is within the province of the jury to award interest or not.

AT law. Action for damages for violation of the long and short haul clause of the interstate commerce law.

C. C. & C. L. Nourse, for plaintiff.

W. C. Goudy and *Hubbard & Dawley*, for defendant.

SHIRAS, J. (*charging jury orally*)—The issues presented in the case on trial before you arise under the provisions of the act of congress passed February 4, 1887, and commonly

known as the "interstate commerce law." As you know, the congress of the United States, for the purpose of regulating the business carried on by the common carriers of persons and property by means of railways, or by a combination of railways and water travel, has passed this act, which regulates, in certain particulars, the carrying on of the passenger and freight business that exists between the different states and territories of the United States. The law, by its provisions, applies to interstate commerce; that is, commerce that is carried on between the states and territories of the United States. Section 2 of this act in substance prohibits the charging or collecting from any person or persons a greater or a less compensation for services rendered in the transportation of passengers or property than is charged or collected from others for the transportation of similar property under substantially similar circumstances. Section 3 of this act makes it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person, company, firm, corporation, or locality over others, or to any particular description of traffic. Section 4 of this act in substance makes it unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of a like kind of property, under substantially similar circumstances, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance, it being provided, however, that, upon application to the commission appointed under the provisions of this act, such commission may authorize the carrier to charge less for the longer than for the shorter distance, and in this way relieve the carrier from the operation of the provisions of section 4 of this act.

The interstate commerce act.

In the case now under consideration the plaintiff claims that the defendant company violated the provisions of this act, and particularly the fourth section thereof, in that the company required him to pay a larger sum for the transportation of certain grain, to wit, corn and oats, from the town of Scranton, a station on the defendant's line of railway in the state of Iowa, to the city of Chicago, Ill., than the company was then charging for shipping the same kind of grain from Blair and other points in the state of Nebraska to Chicago, the latter being the longer distance. In the schedule attached to the petition the date of each shipment made by the plaintiff is set forth, with the number of pounds shipped and the rate charged, to wit, eighteen cents per hundred pounds, and the answer admits the statements thus made to be correct. On

Plaintiff's and defendant's contentions.

behalf of the plaintiff, it is claimed that the rate thus charged him was greater than that in force over the line of defendant's road upon shipments made from Blair and other Nebraska points, and plaintiff has introduced evidence tending to show the rates charged from Blair and other points in Nebraska, and the excess thereof over the rates charged to plaintiff for shipment of the like kind of grain from Scranton to Chicago. On behalf of defendant, it is denied that the rates charged for the transportation of grain from the points named in Nebraska in fact exceeded that charged to plaintiff upon the shipments from Scranton, and defendant has introduced evidence tending to show the rates in force at the different times included in the controversy, and further claims that the rates in force from Blair and other points in Nebraska were the result of a joint tariff adopted by the Fremont, Elkhorn & Missouri Valley Railway Company and the Sioux City and Pacific Railway Company, and the defendant railway company, and further pleads that the circumstances in existence in Nebraska were dissimilar from those existing in Iowa at the time the shipments in question were made, because there existed upon certain lines of railway running to St. Louis, Mo., and Beardstown, Ill., and thence connecting with lines reaching the eastern seaboard, a secret cut rate upon grain shipments, which resulted in diverting from the defendant's line, running through Iowa to Chicago, a large part of the business which properly belonged to it, the same being sent from the points in Nebraska over the southern lines, and that it was to meet the competition thus created that the so-called Nebraska tariff was put in force.

So far as the matter of the rates from Blair and other points in Nebraska to Chicago being established by means of joint tariff arrangements between the defendant company and its connecting lines extending into Nebraska, that will not defeat the plaintiff's right of recovery, if the facts show that the defendant company was charging a greater sum for the like service at the same time and under the like circumstances, for a shorter than a longer haul in the same direction, over the same line on which it was carrying the grain shipped from Nebraska, under the rates fixed by the joint tariff. What I mean to say is, that if, from the evidence in this case and the instructions which shall be further given you by the court you shall find that the Chicago & Northwestern Railway Company had, by the entering into a joint tariff with the Fremont, Elkhorn & Missouri Valley Railroad Company and the Sioux City & Pacific Railroad Company, aided to put in operation tariff rates, whereby corn and oats could be shipped from Blair

Joint tariff rates no defense.

and other points in Nebraska, under the like circumstances and conditions as the corn and oats shipped from points in Iowa, through Iowa, to the city of Chicago, and that by the doing thereof a larger sum was charged for a shorter haul than for a longer haul over the same line in the same direction, then the Chicago & Northwestern Railway Company, by joining in that tariff, and by aiding in putting it in operation has rendered itself liable to be called to account by any one who has suffered damage by reason of the Chicago & Northwestern Railway Company's charging that person a larger sum for the shorter than for the longer haul; in other words, companies cannot escape the duty and obligation that is placed upon them by the provisions of the interstate commerce law by entering into joint tariffs. Railroads have the right to enter into these joint tariff arrangements. The business of the country could not be carried on, probably, at least, not with any success, unless it was done, and they have a perfect right to do it; but when they do do it, the duty and obligation is on them to observe the provisions of the interstate commerce law in making and putting into operation these joint rates. It is just as much a violation of the law to charge a larger sum for a shorter than for a longer haul, under substantially similar circumstances, if it is done by the operation of a joint tariff, as it would be if it was done by the operation of a single tariff by a single road.

Again, it appears in evidence that, in making out the various tariffs or schedules of rates which have been put in operation from time to time, different points upon the defendant road have been taken, as I understand the testimony of the witnesses, as the basis used in establishing the rates. By way of illustration: They will figure from a certain point, like East Clinton, on the Mississippi. They will take that as a basis, or they will take Chicago as a basis, for figuring on. They may take Turner Junction as a basis for figuring on, or they may take Rochelle as a basis for figuring on. Now, that is a matter for the railway companies to decide for themselves, for their convenience in making out the different schedules of rates. But, whatever basis or whatever point they may take as a basis for establishing rates, the duty and obligation is upon them that they shall not, by this means, evade the provisions of the law. They cannot, by shipping to some point arbitrarily fixed by themselves, by naming the points where they shall cause their cars to be billed to, make a reduction by charging a rate to that point, and from there another rate to another point,—they cannot in that way escape the consequences of the result of that arrangement, if it puts

Selection of points as basis for computing rates.

an undue burden upon any shipper. By way of illustration: Here is the Chicago & Northwestern Railway, that runs from Missouri Valley, through to Chicago, and through Turner Junction and Rochelle, we will assume. Now, then, if the Chicago & Northwestern Railway Company, in making out its tariffs, takes Turner Junction, or Rochelle, or any other point on the way to Chicago, as a point to figure from, it may do that; but it cannot, by doing that, justify itself in charging shippers in Iowa a greater sum for taking produce through to Chicago than it charges other parties shipping from Nebraska; that is to say, the duty and obligation, as I have already said to you, is on them not to make any unjust discrimination, or give any undue preference, to shipments made from special points or localities, or any undue preference to the shipments of one individual over another, nor of one kind of business over another. The general theory of the interstate commerce law is that, as near as it can be done, all localities and all individuals substantially similarly situated, shipping freight over the same line of road in the same direction, under substantially similar circumstances, shall have the same or properly proportioned rates; in other words, there must be no undue preference given to one individual over another, or one locality over another. It is just as much a violation of the law to do that by any method of adopting different points, and billing cars to one point, and then to another point, on the line, as it would be a violation of the law to simply charge a greater sum for a less service of hauling from one point to another.

Rates for long and short hauls. Effect of secret cut rates.

The plaintiff sets forth his cause of action in two counts in the petition. In both counts he charges that on certain dates that are named in the accounts that are attached to the petition he forwarded certain grain (corn and oats) from Scranton, a station upon the line of the Chicago & Northwestern Railway, through to Chicago, and that he was charged at that time a rate greater than the rate which the railway company was giving to its patrons or to others at Blair and others in Nebraska, a point which is at a distance greater than is Scranton from the terminal point, Chicago. Now, as I understand it, the question that you have to determine, under the evidence in the case, is whether that statement is true. Is it true that, upon any one or more of the shipments that are set forth in the schedule annexed to the petition, the plaintiff was required to pay a greater sum than was being charged at that time by the defendant, the Chicago & Northwestern Railway Company, for performing the like service for the transportation of other grain of the

same kind (corn and oats) from points in Nebraska, over the same line, in the same direction, passing through Scranton to the city of Chicago? Evidence has been introduced in the case upon which the court has been asked to submit to the jury for your determination, as a matter of fact, whether the defendant railway company was not justified in making the reduction of rates, by reason of the fact that it appeared, as it is claimed under the evidence, that there had been what was called a "secret cut rate" put in operation in Nebraska, which affected the business upon the line of the Fremont, Elkhorn & Missouri Valley and the Chicago & Northwestern Railways; the result of this better rate being to cause quite a large portion of the business that would naturally be tributary to the Chicago and Northwestern line to go south, by way of St. Louis and Beardstown, and in that way, through St. Louis and these southern points, to the eastern seaboard. Under the ruling of the court upon the question of law, although a rate of that kind may have existed, it is the view of the court that that question cannot be determined by this court and jury. The consideration of questions of that kind—of the right of the railway company to be excused from the duty and obligation that is placed upon it by the fourth section of the interstate commerce law—is, by the express terms of the law itself, conferred upon the interstate commerce commission. As you know, there is a body of commissioners provided for by this interstate commerce act,, and the fourth section of this act, by its express terms, in a proviso that is therein contained, places, upon the commission the duty, and gives them the authority, to investigate and determine whether there are such facts and circumstances surrounding a railroad at a given time as would justify the commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line, in the same direction, under otherwise substantially similar circumstances. In the view that the court takes of it, this court and jury cannot determine that question, which, by the law, the commission are authorized to determine. Whether the railway company was justified by a cut rate, making what was called in argument "illegitimate competition," and circumstances of that kind which grow out of the handling and management of the railroad business of the country by other competing lines and its effect upon the business of the defendant company, in the judgment of the court, is a question that cannot be submitted to you. Questions of that kind are for the judgment and determination of the board of commissioners appointed under this act, and the courts and juries, when they are called

to act upon particular cases arising under this act, where it is claimed that the law has been violated, are only authorized to determine the question whether, in the service rendered, the character of the property, its conveyance, and other facts which inhere in the carrying of the freight upon the particular line which is charged with the wrong-doing, there existed dissimilar circumstances and conditions, relieving the company from the charge of collecting a larger rate for the shorter haul over the same line, in the same direction, and under otherwise substantially similar circumstances and conditions. Now, then, if the railway company had been authorized by the commission to do that, then they could plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the larger rate for the shorter distance; but no such action has been taken by the interstate commission. They have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance.

Under the circumstances I have detailed before you, as I view it, this court and jury cannot authorize the railway company to make such charge, or justify it after it has been done. There is no evidence in this case that the railway commission has ever passed upon the question, or authorized the railway company to charge a greater sum for the shorter than for the longer distance; therefore, the question comes down to this; Does the evidence satisfy you that at the time when the Chicago & Northwestern Railway Company transported the oats and corn set forth in the schedules attaches to the petition from Scranton, Iowa, to Chicago, Ill., it had in force and operation a tariff rate whereby it did, either by itself, or in conjunction with the other roads that have been named in your hearing, transport the like produce (corn and oats) from points in Nebraska over the same line, the Chicago & Northwestern Railway in the same direction, to Chicago, Ill., at a rate less than it was charging for the like services to the plaintiff? Now, if it did do that,—if there was any reason sufficient to influence the Chicago & Northwestern to put a lower rate in operation in Nebraska,—it had a right to do it, and had a right to fix this rate in competition with any secret rate to which it might be subjected in Nebraska, either directly or indirectly, through the operations of the competition that was brought to bear upon the roads connecting with the defendant line, the Fremont, Elkhorn & Missouri

Court and jury cannot authorize greater charge for shorter haul.

Valley and the Sioux City & Pacific; but if, by reason of that competition, or for any other reason, the Chicago & Northwestern Company did enter into a joint arrangement with these companies, in which it fixed this lower rate, then, under the law, it was charged with the duty of not charging a greater sum to Iowa shippers for the shipping of the like produce—the like grain—over its line of road to Chicago, under substantially similar circumstances and conditions, because that was the shorter distance. And if it were in fact proven that it did charge a greater sum to Iowa shippers on the like produce, and for the like service, it would establish a violation of the fourth clause of the interstate commerce law, because it would be charging a greater sum for hauling a shorter, than for hauling a longer distance, under substantially similar circumstances.

Similar circumstances and conditions.

Now, then, gentlemen, it is for you to determine, under the evidence in this case, whether or no the produce that was forwarded by the plaintiff from Scranton was of the same kind that defendant forwarded under its tariff from Blair, Neb. The court can take judicial notice of distances, and instruct you that the distance is greater from Blair, Neb., to Illinois than from Scranton, Iowa, to Illinois, and it is for you to determine, if there is any dispute in the evidence, whether the Nebraska grain passed over the same line (the Chicago & Northwestern) that the freight did in going from Scranton, Iowa, to Chicago, Ill. Is there anything, then, in the evidence, as it is submitted to you, that would justify you in finding that there was any dissimilarity in the circumstances and conditions under which the defendant railway company forwarded the freight of the plaintiff from Scranton, Iowa, and under which it forwarded the produce (corn and oats), coming within this schedule or tariff of rates when it received the same from these connecting lines in Nebraska? As I have already said to you, the law, under this fourth section of the statute, requires that for similar services, rendered under similar circumstances, it shall not charge a greater sum for a shorter than for a longer haul over the same line, and in the same direction. Has the plaintiff, upon whom is the burden of proof, satisfied you, by a fair preponderance of the evidence, that as to any one or more of these shipments that are set forth in the petition the defendant company did in fact charge a greater sum for hauling from Scranton the oats and produce of plaintiff than it charged for the like services from Blair, Neb., at the same time? If so, and if there is nothing in the evidence of the circumstances surrounding the transportation of this grain over the line of the de-

fendant's road that would justify defendant in making a larger rate from Scranton than from Nebraska points, then the company has charged a greater sum for making a shorter than a longer haul of the like property, under like circumstances, and in so doing has violated the interstate commerce law.

There is a dispute between the parties as to the rates that were charged as to some of these shipments. That is a matter for you to determine under the evidence; and if you find that, in fact, the Chicago and Northwestern Railway Company did not make any discrimination, and was not charging the plaintiff for conveying his property from Scranton a larger rate from Scranton, Iowa, to Chicago, than it charged at the same time from Blair, and other points in Nebraska, to Chicago, then the plaintiff has failed to make out his case, and your verdict must be for the defendant. If, on the other hand, you find on this issue for the plaintiff—in other words, if you find that the Chicago & Northwestern Railway Company did charge more for the transportation from Scranton to Chicago than it was charging at the same time for the transportation of like property, under like circumstances, from Blair and other points in Nebraska—that would justify you in finding upon that issue for the plaintiff, and we then come to the rule of damages.

Dispute as to rates that were charged.

The rule of damages under both counts of the petition is the same: First ascertain what the rate was that was fixed for the transportation from Blair, and other points in Nebraska; that is, the rate per hundred pounds. Then find what the rate was that was in fact charged per hundred pounds to the plaintiff for forwarding the oats and corn from Scranton to Chicago. The difference between these two, if there is any, is the damage per hundred pounds that was caused to the plaintiff. Now, the schedules attached to the petition show the number of hundred pounds that is claimed to have been transported, and it is admitted in the answer that these were transported as shown, so there is no dispute on that point. Take the number of hundred pounds that you find were transported, and take the difference, if any, between these rates per hundred pounds, and, by mere multiplication of one by the other, you will find the amount of damage. It may be required that you make this computation more than once, because it is claimed that the difference was less at times than at other times, and that is for you to determine under the evidence. Take the number of hundred pounds of these shipments, as they are set forth in the schedules attached to the petition. Ascertain

Measure of damages.

the rates fixed by the tariff that you find defendant at that time had in force from Nebraska. Take the difference between that and the rate actually charged the plaintiff, if there is any, and the difference is the damage per hundred pounds that has been caused the plaintiff. You understand, gentlemen, that it is the damage to the plaintiff that is to be considered. It is not a question of how much the defendant railway company may have received. When joint rates are made, the shipper has nothing to do with that; he has no control over that. His privilege is to deliver his freight that is to be transported to the railway company, and, if it comes under the operation of a joint rate, it is not a matter of any moment, as between him and the railway company that handles his freight, what particular share or portion of the rate that is actually paid on the shipment any particular railroad received. If two or more railway companies, entering into a joint tariff arrangement shall so carry it out as to cause a damage to the shipper—as, by way of illustration, charging him under the joint tariff three cents or five cents more than they ought to have charged him—it is not a question in which the shipper is interested, when he sues to recover, to know what particular division may have been made of the five cents thus illegally charged. The shipper would have a right to look to all of the railways, or to any one of them, which had aided in committing the wrong, by receiving from him a larger rate than he ought to have been charged. If, by the effect of a joint tariff of rates the Chicago & Northwestern Company aided in putting in operation, the plaintiff was charged for shipping his grain from Scranton five, or six, or one cent more than they ought to have charged him, the plaintiff is entitled to recover in this action the amount of the overcharges he has paid, regardless of what division may have been made, or whether there was any division, between the different companies putting the joint rate into operation; because it is not a suit to recover back the amount the defendant company may have received, but it is an action sounding in tort for damages, wherein the shipper seeks to recover the damages claimed to have been caused him by charging an illegal rate. The unlawful overcharge is the element on which the claim for damages is based.

Under the law, it is within your province to determine whether or not interest shall or shall not be paid on the amount of overcharge, if you find any. If you find that the plaintiff has been overcharged upon particular shipments, it is not a matter in which the law determines whether interest shall be given or not. In some

Interest.

cases founded on breach of contract, the parties may be entitled to recover interest; but in cases for damages sounding in tort (and this is a case of that kind), it is within the province of the jury to award interest or not. If, in order to fairly compensate the plaintiff, in your judgment, he should receive 6 per cent. interest, it is within your power to award it.

Action for Violation of Long and Short Haul Clause of Interstate Commerce Act.—In an action for a breach of the fourth section of the Interstate Commerce Act, providing that a common carrier shall not charge a greater compensation for the transportation of a like kind of property, under similar circumstances, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included in the longer distance, the fact that the rate for the longer distance was established jointly between the defendant and competing railroads, is no defense. Nor is evidence that, in the state to which the longer haul extended, cut rates had been instituted by reason of competition between defendant and other companies, admissible, unless the ground has been laid therefore in the pleadings. But the plaintiff cannot recover, unless he shows that the higher rate which he has been charged for the shorter distance, was for like services and under similar circumstances. The fact that the freight for the longer distance, was billed to some point short of the destination of the shorter haul, will not bar plaintiff's recovery, when such freight was intended to be, and was in fact taken to the destination of the shorter haul. In such an action, where the plaintiff is entitled to the same rate for the shorter haul as is afforded other shippers for the longer haul, the measure of damages is the difference between the amounts paid by each for the like service. Junod *v.* Chicago & N. W. R. Co. (C. C. S. D. Iowa), 47 Fed. Rep. 290.

See generally as to the construction of the long and short haul clause of the Interstate Commerce Act, *Ex Parte* Koehler (C. C.), 29 Am. & Eng. R. Cas. 44; Missouri Pac. R. Co. *v.* Texas & P. R. Co. (C. C.), 31 *Id.* 76; *In re* Southern R. & S. Assoc. (I. C. C.), 29 *Id.* 5; *In re* Louisville & N. R. Co. (I. C. C.), 29 *Id.* 16; Boston & A. R. Co. *v.* Boston & L. R. Co. (I. C. C.), 31 *Id.* 654; Harwell *v.* Columbus & W. R. Co. (I. C. C.), 31 *Id.* 640; Thatcher *v.* Delaware & H. C. Co. (I. C. C.), 31 *Id.* 637; Allen *v.* Louisville, N. A. & C. R. Co. (I. C. C.), 31 *Id.* 630.

Interstate Commerce Act—Sale of Tickets at Less Than Posted Rates.—Where a railroad company has advertised one rate for unlimited first-class tickets between certain points and a less rate for limited first-class tickets between such points, it may sell at the latter rate tickets which, though not limited as to time of use, do not entitle the holder to the right to stop over at intermediate stations, as is allowed under the unlimited tickets, since the requirement that the ticket shall be used only for a continuous passage renders it a "limited ticket."—United States *v.* Egan 47 Fed. Rep. 113.

Interstate Commerce Commission—Findings of Fact.—The finding of facts in a report by the interstate commerce commission has no greater weight where the commission itself proceeds by petition under section 16, 24 St. at Large, p. 384, to enforce obedience to its orders, than where an individual aggrieved so proceeds, and is not conclusive evidence of such facts.—Interstate Commerce Commission *v.* Lehigh Valley R. Co. 49 Fed. Rep. 177.

Same—Disobedience of Orders—Injunction.—A preliminary injunction to

restrain a carrier from disobeying an order of the interstate commerce commission will not be granted in proceedings under section 16, 24 St. at Large, page 384, as amended, when the answer denies the facts on which the order was based.—Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. Rep. 177.

State Railroad Commission—Appeal to Courts from Order of.—No appeal lies to the district court from an order of the railroad and warehouse commission relating to the mode of operating a railway so as to promote the safety and convenience of the public. Objections to such an order can only be made by way of defense to an action brought to enforce it.—Minneapolis & St. L. R. Co. *v.* Board of Railroad Commissioners 44 Minn. 336.

LITTLE ROCK & MEMPHIS R. CO.

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO. *et al.*

(*U. S. Circuit Court W. D. Tennessee, September 16, 1891, 47 Fed. Rep. 771.*)

Interstate Commerce Act.—Discrimination between Connecting Lines.—A railroad company, which is the owner of a road between two points and extending far beyond one of such points, may prefer itself over a competing company owning a line terminating at such points; and such company may refuse to through route with such competing company, to points on its own road not reached by the competitor's road, or to recognize tickets issued by the competing road or others over its road to such points, and other roads are not at fault in yielding to its refusal to recognize such tickets. Such conduct does not constitute "discrimination" against the competing road under the interstate commerce act. It is not the case of a road preferring unjustly and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself.

Same—Same.—A railroad company may prefer a connecting road with through facilities to one with only local facilities,—a road that goes all the way to a certain point, to one going only part of the way; and the interstate commerce act does not forbid such a preference.

Same—Remedies Provided by Interstate Commerce Act not Exclusive.—The special remedies provided by the interstate commerce act are cumulative, and not exclusive of the general remedies given by the judiciary act conferring jurisdiction of all suits and controversies arising under an act of congress, regardless of any diversity of citizenship between the parties.

IN Equity.

U. M. & G. B. Rose and *W. G. Weatherford* for plaintiff.

Morgan & McFarland, Poston & Poston, and *Wm. M. Baxter*, for defendants.

HAMMOND, J.—The Little Rock & Memphis Railroad extends from Memphis, Tenn., to Little Rock, Ark., where it

has a physical connection with the St. Louis, Iron Mountain & Southern Railroad, extending from St. Louis, Mo., by way of Little Rock, to Texarkana, at the junction of the boundaries of the states of Texas, Arkansas and Louisiana, where it connects with other railroads running into Texas and across the continent. The East Tennessee, Virginia & Georgia Railroad, with its leased line of the Memphis & Charleston Railroad, extends eastwardly from Memphis to the eastern boundary of the state of Tennessee, and with its connections runs into many states and to the seaboard. The Iron Mountain road has a branch of its road running from Bald Knob, Ark., to Memphis. At Memphis the eastern and western connections are made by rail through the streets of the city, and by railroad transfer ferries across the Mississippi river; but it is alleged in the bill that as to passengers the connection with the Iron Mountain road must be made by ordinary vehicles, through the streets, transferring them from one railway car to another from the stations of each road, while the connection with the Little Rock road may be made by rail through the city and across the river; wherefore the bill alleges the traveling public prefers the Little Rock & Memphis road, and would largely patronize it, but for the alleged discriminations against it, which it is the purpose of the bill to remove. These discriminations consist, as appears from the averments of the bill, of a traffic arrangement made between the Iron Mountain road and the East Tennessee, Virginia & Georgia system, whereby through ticketing of passengers is made to points beyond Little Rock over the Bald Knob branch of the Iron Mountain road, which is refused to the Little Rock road, and, coming this way, the Iron Mountain refuses to sell through tickets over the Little Rock road to Memphis or beyond. This arrangement is carried out by the East Tennessee, Virginia & Georgia declining to sell through tickets over the Little Rock, and the Iron Mountain refusing to recognize such tickets on its road; and the bill states specfically the facts and figures which show how hardly this discrimination bears upon the Little Rock road, and deprives it of travel which, before the Bald Knob branch was built, it enjoyed as a monopoly, and would yet enjoy, the bill states, if the choice of the traveling public was allowed to operate in favor of its better facilities and shorter route. The bill avers that this discrimination is in violation of the interstate commerce act of congress, and prays for a mandatory injunction and other process to compel the defendant roads to sell and recognize through tickets over the plaintiff road, and for general relief.

Facts.

It may be observed here that the bill does not complain of any discrimination to Little Rock or points on the plaintiff road between Little Rock and Memphis, and it is stated in the argument that the East Tennessee, Virginia & Georgia system still sells tickets over the plaintiff road to Little Rock, if desired, as well as over the Iron Mountain; but the trouble arises over points beyond Little Rock west, and beyond Memphis east. To this bill there has been a demurrer filed, because—*First*, there is no equity in it; *second*, there is no complaint cognizable under the interstate commerce act, and no conduct is averred violating it; *third*, the matter complained of is not subject to legislative or judicial control, and can be reached only by mutual agreement; and, *fourth*, not coming within the interstate commercial act, the court has no jurisdiction, a diversity of citizenship not being averred. The bill is based upon the plaintiff's construction of the third section of the interstate commerce act, which reads as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsover. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." 24 St. 380.

The questions made about the jurisdiction may be easily disposed of so far as they relate to the authority of the court to adjudicate the issues tendered by the bill. The subject-matter of the suit is one arising under an act of congress, and the court has jurisdiction without regard to any diversity of citizenship of the parties. Kentucky & Indiana Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. Rep. 567, 615. The argument for the demurrer proceeds, however, upon the theory that the

Question of jurisdiction.

jurisdiction of the court here is limited by the provisions of the interstate commerce act prescribing certain remedies which may be taken in this court for its enforcement. It is hardly necessary to decide that question; but, if it be, there can be but little doubt that the plenary jurisdiction of this court to entertain all controversies arising under an act of congress, either at law or equity, has not been abbreviated by this act in relation to controversies arising under it, but the special remedies so far as they are special, are merely supplementary to the ordinary remedies existing under the subsisting judiciary act, which governs all our jurisdiction. This is fairly inferable, if not directly decided, from the decision of Circuit Judge JACKSON, just cited; and in my judgment there can be no doubt of this, whether it has been so decided or not. Whatever jurisdiction a court of equity may entertain of this controversy may be entertained here, if not under the regulations of the interstate commerce act, prescribing certain remedies, then under the judiciary act, giving us the powers of an equity court as to all cases and controversies arising under any act of congress.

The remedy for the discrimination alleged—Violation of commerce act.

But when we come to consider that branch of the demurrer which denies the equity of this bill, as in all other demurrers of like kind, it presents for judgment the question whether the bill states an equitable right and asks an equitable remedy, taking the facts averred to be true as stated. It is not so much a question of jurisdiction, often, as it is a question of the sufficiency or merits of the bill; and, that being the case here, we proceed to consider it in that view. If this bill averred that the East Tennessee, Virginia & Georgia Railroad refused to give passengers going over the plaintiff road the same rates and facilities, including through tickets and traffic transfers, that it affords to the Iron Mountain road for passengers going to Little Rock or any other point in the plaintiff road, the court would not hestitate to say that it would be a violation of this section of the interstate commerce act. Whether such violation could be remedied by a court of equity, and by a bill like this, or in a court of law, or could only be reached, as probably many violations only can, by resort to the remedies afforded for criminal prosecution by the act, would be another matter. But it does not follow, because congress has not gone far enough to construct the machinery to compel such connections and facilities in the one case as are given by contract in the other case, that it is not a violation of the interstate commerce act; nor, because a court of

equity or a court of law cannot redress the violation, as they are now authorized to proceed, that there has been no violation at all. Nor can this prohibition of undue or unreasonable discrimination be evaded by a contract any more than in any other way, if it be undue or unreasonable. It may be that whether the unlawful discriminatian be made through the medium of a contract, whether of "through routing," as it is called, or otherwise, or by a refusal of the same rates and same facilities which are given by contract or without a contract, there is at present no redress by resort either to the administrative board which we know as the "Interstate Commerce Commission," or to the ordinary or special remedies prescribed for the courts of law or equity; yet it might possibly be redressed by the criminal courts under the interstate commerce act, or without the criminal provisions of that act, if the United States had any common-law jurisprudence of crime, (which it has not,) by prosection as for a misdemeanor. But this bill does not allege any such violation of the act as that suggested, and it seems to be conceded that the East Tennessee, Virginia & Georgia road does not sell through tickets, and affords the same facilities over the plaintiff's road as over the Iron Mountain to Little Rock; the trouble being not there, but in the refusing to sell through tickets, and afford the same facilities to points beyond Little Rock and not on the plaintiff road, but on the road of the East Tennessee, Virginia & Georgia road's co-defendant, the Iron Mountain road.

Railroad may prefer itself.

Now, reversing the proposition just considered, and coming this way from the west, the court could have just a little hesitation in holding that it cannot be a violation of the interstate commerce act, and it may be even doubtful if congress could make it so, since it might be taking property for the public use, so to speak, without compensation, or depriving one of property without due proof of law, for the Iron Mountain road to prefer to travel passengers over its own road to Memphis to traveling them over the plaintiff's road, whether they come from Little Rock or beyond on the Iron Mountain road, or some other, and whether they be going only to Memphis or beyond to the eastward or elsewhere; and it cannot be either an undue or an unreasonable discrimination against the plaintiff to afford for passengers superior facilities, such as through tickets, shorter rates, or the like, over its own road, in preference to that of its rival, running a road part of the way in the same direction. For illustration, if a passenger wishing to go from Texarkana or further on from some point in Texas to Memphis or beyond desires to travel over the Iron Moun-

tain road, why should it not take him all the way to Memphis, and deliver him to the East Tennessee & Georgia, or some other road wishing to take him on easy terms as to rates, through tickets, and the like, rather than shunt him, at Little Rock, upon the plaintiff's road? It cannot be an unfair or an unreasonable discrimination against the plaintiff for the Iron Mountain to keep him on its own road by offering him superior facilities in the respects mentioned, however undue or unreasonable it might be in other roads to refuse the plaintiff the same facilities in transporting him that it affords the Iron Mountain. In other words, the Iron Mountain would not be violating the statutory prohibition in such a transaction, whatever may be said of other roads. It would be free of such imputation, because it has a line of its own, covering the same distance, and may prefer itself to others, as we all do in obedience to human nature.

Case against East Tenn. road.

But even as to the East Tennessee, Virginia & Georgia road, why should it not take this passenger from the Iron Mountain at Memphis on through tickets, easy rates, and whatever terms may be agreed upon, without an imputation of discriminating against the plaintiff. It could only do that by refusing to take the plaintiff's passengers, brought to Memphis, on the same terms as it took the others; and this refusal is not alleged. It is no fault of the East Tennessee road that the plaintiff cannot induce the Iron Mountain to bring passengers over its road from Texas to Little Rock and deliver them for transportation to the plaintiff from Little Rock to Memphis; and we have seen that the Iron Mountain may lawfully refuse this, because it has a road of its own for that service.

Case against Little Rock road as to passengers going west from Memphis.

Recurring to travel westward from points under the control of the East Tennessee, Virginia & Georgia Road, and we have precisely the same condition; in principle, however, it may seemingly be diverse, for, one desiring to travel from Knoxville, Tenn., let us say, to Texarkana, or beyond into Texas, reaches the Iron Mountain at Memphis, and while he may have a choice of two roads there it is for only a part of the way, and he must at last take the Iron Mountain at Little Rock, and go over that road beyond. It does not depend wholly upon equal or better facilities for transfer at Memphis, but also upon the capacity to transport the passenger to his destination beyond there. Is it not plain that the Iron Mountain may offer him the same facilities to take its road at Memphis that it offered in the other case,—may prefer its own road if it chooses? That it may force him to do that thing by refusing to enter into any ar-

rangement with the plaintiff for a joint transportation of the passenger is equally clear. It is again the right of one to prefer one's self to another, and that cannot be an undue or unreasonable discrimination, however hardly it may bear upon that other, as long as the other is not molested in its business by a refusal to transport its passengers upon the same terms granted to the passengers of other roads. It would be unlawful if the Iron Mountain refused the same rates from Little Rock onward that it offered to other roads feeding it at that point, or to other passengers taking its track there; but it cannot be unlawful to prefer to feed itself from Memphis, rather than have the plaintiff feed it. So the East Tennessee, Virginia & Georgia road, like the passenger we have in hand, may be compelled to route over the Iron Mountain road, rather than over the Little Rock road, by this exercise of its lawful right of preference of its own road by the Iron Mountain. The East Tennessee might violate the statute, if the plaintiff's road ran parallel with the Iron Mountain all the way our passenger is going, if it refused him a choice of routes on the same terms; but tht is not this case, and the Iron Mountain has the advantage in reaching points not reached by the plaintiff, and which can only be reached over its own road. The sum of it is that the whole merit of this bill must be tested solely by the right of the Iron Mountain to prefer its own road to that of the plaintiff; and, that right being lawfully exercised, there can be no wrong in other roads yielding a compulsory adjustment to it; and the plaintiff is without remedy, unless congress adopts the suggestion of the interstate commerce commission, and interferes to make rates and routes through some agency appropriate to the process, if congress has the power in a case like this, which may be doubtful. Little Rock & M. R. Co. *v* East Tennessee, V. &. G. R. Co., 3 Int. St. Com. R. 10. In that case the interstate commerce commission clearly declares that that which was complained of by this bill is in violation of the section of the act which has been quoted, and refused relief only because congress has not authorized the commission, or the courts, or any other governmental agency to correct the violation by adjusting the rates and facilities to the situation; and, in the absence of such legislation, like that found in the English act to accomplish a similar purpose, the object can only be accomplished by agreement. It is alleged in the argument here that there is no power anywhere to coerce such an agreement until congress enlarges the legislation. If this be so, then, indeed, a criminal prosecution would be the

The decision of the interstate commerce commission.

only remedy; but it is possible, if the court found the transactions complained of to be a violation of the act, that at least partial relief might be afforded through this bill by *mandamus*, or injunction, or both not to make a contract for the parties, or rates of carriage, or the like, but by forbidding and enjoining the execution of any contract which is unlawful until it be made lawful by conformity to a regulation of commerce established by congress under its authority. We do not quite agree that the courts would be powerless in such a case to redress the violation of an act of congress. But we are relieved here of any decision of that question by our conclusion that it is not a violation of the interstate commerce act for a carrier to prefer its own road to that of its rival, in a case like this, and for the reasons already stated. The interstate commerce commission places its opinion upon the ground that, while there is an apparent justice in the view we have taken, it is subordinate to the public policy manifested in the act, of facilitating the unrestricted flow of commerce between the states, and designed "to insure to the people every facility of equal choice which franchises granted in the public interest can by any combination of reasonable routes afford." This is true beyond question, but in exercising this, as every other governmental power, legislation is limited in this country, if not in England, where parliamentary power is in a measure supreme, by private right, oftentimes. No one is compelled to apply or to use his property for the public good without compensation. If the public takes it to itself this is clearly so, and, while the compulsory surrender of the private right we are considering for a public benefit might not be a taking of property within the constitutional prohibition, it is so nearly akin to it in principle that, even were the power to compel it existing, the exercise of the power should not be implied except by necessity; and certainly it seems to us not from the language of this act, so equivocal in its relation to the precise point of consideration presented by the facts of this case, however plain it may be in relation to other situations. Moreover, the prohibitions against impairing vested rights or depriving one of his property without due process of law and the like, found in a variety of forms in our American consitutions, state and federal, may impose some limitation upon such legislation, or upon a construction of general language used in this legislation, to prevent the abrogation of this right in the manner suggested by the interstate commerce commission; and possibly this accounts for the absence of the clauses of the English legisla-

Limitations on possible legislation.

tion referred to as wanting in our act.

On the other hand, until an authoritative adjudication, we could not entirely agree that, by any contract for through routing between carriers, the prohibited discriminations of this act may be made, or that they would be held to be not prohibited because of any common law right to make such contracts, or that it would be a proper test of the statutory prohibition as to the undue and unreasonable preference or advantage and reasonable, proper, and equal facilities to apply the common-law right of contracting for carriage beyond the carrier's own lines, thereby giving to a line composed of several independent carriers this benefit of the ownership of a continuous road, which we concede to the Iron Mountain in this case; for the common-law right to contract, as between independent carriers, is not the same thing as a common and joint ownership, by any means; and the one may be the subject of regulation by congress, while the other may not; and it is not quite clear why a given carrier may afford a preference to a thing carried by one road over that carried or which might be carried by another through the medium of a contract to carry jointly, when it could not do that thing outside of such a contract; nor why the fact of such a contract would make a given discrimination otherwise unlawful a lawful one under this act. But in this case we have endeavored to show that the discrimination here does not arise at all out of the contract for through routing between the Iron Mountain and East Tennessee roads, but solely out of the right or advantage of ownership possessed by the Iron Mountain of a road parallel to plaintiff's road. If the East Tennessee road should sell the tickets demanded by plaintiff, it would do no good, unless the Iron Mountain would recognize them, which, because of this advantage of ownership, it is not compelled to do under this act. Circuit Judge CALDWELL decided this in the case of Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. R. Co., 41 Fed. Rep. 559, 42 Am. & Eng. R. Cas. 490, although he gives other reasons also for his judgment in that case, perhaps. It is quite true that the facts of that case are not precisely like this in some respects, for there the Hot Springs road, which was the co-defendant of the Iron Mountain, had no physical connection at all with the plaintiff road, as the East Tennessee road has here, and the only connection was over the Iron Mountain from Malvern to Little Rock. Yet that fact, in the view we have endeavored to present, becomes immaterial as a distinction in this case, because of this fundamental advantage of owner-

Discrimination under contract for through routing.

Road may prefer itself over competing line.

ship all the way from both Malvern and Little Rock to Memphis, which advantage operates as well at Memphis in favor of the East Tennessee road as at Malvern in favor of the Hot Springs road; and the want of physical connection or the fact of physical connection with the plaintiff road does not enter into the question of the reasonableness of the discrimination in one's own favor over one's own road. In either case, as we have endeavored to show, the right of preference growing out of the ownership is paramount to any demand of the public for competing lines in determining the reasonableness of the discrimination made in a case like this. And, as Judge CALDWELL well remarks, to overthrow this right of preference would be to discourage the building of competing lines, rather than to maintain them. The truth is, the plaintiff is a competing line over only a comparatively few miles with the Iron Mountain system, and to force that road to traffic with it would be to give the plaintiff a share of the profits of the capital invested in the whole Iron Mountain system, just as if itwas a part of that road all the way through, instead of a rival road for a part of the distance. This would be an unreasonable discrimination in the plaintiff's favor. It does not seem just that a short road should thus be made equal to a long one in this matter of preserving the public benefit of competition. If the benefit be preserved for the local travel which covers the plaintiff's line, that is all it can justly ask; and it has not the right to become a branch of a trunk line under the pretense of competing for a through travel, which it cannot accommodate. It does not in fact compete for that travel, and cannot complain of discriminations concerning it until it does,—that is, can afford equal facilities, not only for transferring at Memphis, and taking the traveler part of the way, but equal facilities with the Iron Mountain for taking him all of the way that road takes him. This statutory right of equal facilities is reciprocal, and one carrier must be able to furnish equal facilities with the other before it can complain of discrimination. The chief facility is a road reaching the same points with its rival about which the discrimination arises. If the Little Rock had this, I doubt if any combination by contract or otherwise would enable the East Tennessee road to discriminate against it lawfully, although there might be, under existing legislation, no remedy except a criminal prosecution; but, in the absence of this competition in fact for points beyond Little Rock, it cannot be necessary to decide that question.

It may be conceded to counsel for the plaintiff that neither the case of Atchison, T. & S. F. R. Co. *v.* Denver & N. O.

R. Co., 110 U. S. 667, 16 Am. & Eng. R. Cas. 57, nor that of Kentucky & Indiana Bridge Co. *v.* Louisville & N. R. Co., *supra*, controls this. In each of those cases there was a want of physical connection at suitable and properly equipped stations or depots to invoke the requirement of an equal facility for exchange of traffic, which distinguishes it from this case. Moreover, in the Colorado case the supreme court interpreted the constitution of the state as declaring only the common law against discriminations to make it irrepealable, but *non constat* that this third section of the interstate commerce act means no more than the Colorado constitution is interpreted to mean. The language is different, and the historical surroundings of the act of congress demonstrate that congress was exercising its plenary power to regulate interstate commerce, and not declaring the common law to make it fundamental, for, doing only that, it had scarcely any reason to act at all, as the Colorado convention had. And in the Kentucky case it was particularly decided that the plaintiff corporation was not a common carrier at all within the interstate commerce act; and this fact, and the want of reasonable transfer facilities, amply distinguish it from this case.

Colorado and Kentucky cases.

As was said in the Express Cases, 117 U. S. 29, 23 Am. & Eng. R. Cas. 545, the regulation of matters of this kind is legislative, and not judicial, and the courts can go no further than to enforce what congress has in the exercise of its legislative power declared as a proper regulation of commerce. It has not declared, if it may do so, that a railroad reaching with its own tracks an outlet and inlet for traffic over its own road must share with a parallel road its through traffic to points not reached by its competitor by taking that road's through tickets over its own lines upon equal terms, as to rates or otherwise, with its own traffic. It may be compelled to take up the plaintiff's passengers at little Rock, and carry them to the points not reached by the plaintiff's road, upon the same terms as other passengers taking its track at Little Rock, but not upon the same terms as passengers taking its track at Memphis for points on its line beyond Little Rock. The two things are not equal to each other, and that reciprocity of equal facilities for equivalent services is wanting, and therefore the case does not fall within the statutory definitions of the discrimination which is forbidden; and, if the Iron Mountain Road may lawfully decline the tickets which plaintiff would like to issue, the East Tennessee road is not bound to keep them on sale as an equal facility of commerce.

No discrimination shown.

Neither does it seem to me that the case of Oregon Short Line & U. N. R. Co. *v.* Northern Pac. R. Co., 3 Int. St. Com. R. 205. cited by plaintiff's counsel, controls this case. I find some difficulty in this report of the case (and I am unable to find it elsewhere reported) in comprehending the facts, but I think the peculiarity of this case is not in that,—the ownership, namely, by the defendant road of a parallel track covering all the ground of the plaintiff, and extending beyond it to points about which the discrimination complained of has been made. It is true that District Judge DEADY expresses very forcibly his opinion that the law is useless if through routing over an excluded road upon the same terms as the favored road cannot be compelled where the parties cannot agree about it, and if by an agreement for a continuous through freighting the discrimination against competitors thereby effected becomes reasonable simply because of a right so to contract at common law, which right congress possibly intended to modify or regulate by this act; and that which he says is reasonable and plausible indeed. Yet he does not hold this as applicable to roads situated towards each other as these are, if I understand the situation in that case.

Other decisions reviewed.

Again, the case of New York & N. R. Co. *v.* N. Y. & N. E. R. Co., 4 Int. St. Com. R. 1, seems very analagous to this case, and the judgment there seems somewhat inconsistent with that given by the interstate commerce commission in this case when it was before that tribunal, notwithstanding an apparant struggle to distinguish them. But it is distinguished in both the opinions written in that case, though upon somewhat different grounds. The interstate commerce commission in the former case dismissed a petition almost identical with the bill we have before us, because it had no power, and there was none elsewhere conferred by Congress, to make through rates and through routings where they were denied, as may be done under the English legislation, although the very conduct complained of in this case was there held to be a violation of the act; but in the latter case, now under observation, in referring to the former it seems to concede that there was in this case no violation of the act for the reasons stated by Judge CALDWELL, which are quoted, and have been cited by us here. The opinion, however, further refers to the operation of the right of ownership, and in effect holds that, although the defendant companies in the New York & New England case were jointly stockholders in the favored road, they did not own it. If they had owned it, I do not see that it could have been at all satisfactorily distinguished from this case; for, while it is true

that there had formerly been a through routing between plaintiff and the defendant, and that fact was seized upon to relieve the commission of the difficulty of making a through route and a through rate for the parties, as they had only to put the old contract "in force again," it is not quite clear how the commission (or the court) has any more power to impose upon an unwilling party an old and abrogated contract than it has to make a new one. Neither is it quite plain how the ownership of all the stock in the favored line by the two defendant companies jointly operating it for their joint benefit is not in the practical operation of the freighting business, the same thing as if they had owned the road, either or both of them, as a part of their corporate belongings, as in this case the Iron Mountain does, although the technical difference in the tenure (if we may use that term somewhat untechnically) is apparent.

The truth is that in the careful investigation of the cases on this subject which I have endeavored to make I have been occasionally perplexed to reconcile some of the expressions of opinion and judgments with each other, and all the courts and judges seem to find much difficulty in interpreting and applying this act of Congress, which is in all its parts a new and experimental chapter of legislation. I desire, therefore, most carefully to limit this judgment to the precise boundaries of the facts in this case. It would be undoubtedly a complete answer to this bill to hold, as counsel for the defendants so strenuously argue we must hold, that the interstate commerce act has not at all interfered with the common law right of contracting between connecting and independent carriers for a continuous through line, excluding all connecting competitors or rivals per force of the contract, just as if one owner absolutely owned the whole line. But this case does not require such a holding; nor do I think that technically there has been any adjudication to that effect, whatever may be said of expressions of opinion in that direction. It may be that it is a correct doctrine, but certainly that which we hold here can be, whether the other be or not. That about which I have no doubt on the facts of this case is that the Iron Mountain road, being the owner of a road of its own between Little Rock & Memphis, may prefer itself even to the extent of "crushing out the life of the plaintiff"—to use the language of the bill and of counsel—by that which was done in this case; that, whether done by a contract with other roads or without, it may refuse to through route with the plaintiff to points on its own road not reached by the plaintiff's road, or to recognize tickets issued by the plaintiff or others over plaintiff's roads

The Points decided.

to such points; and that, having this power of ownership to protect it in doing this, other roads are not at fault in yielding to its refusal to recognize such tickets. It is a misnomer to call that which the Iron Mountain is doing "a discrimination" against the plaintiff under the interstate commerce act, or any other careful use of that word. It is not the case of a road preferring unjustly, unduly, and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself. This is the case as between the Little Rock & Memphis road and the Iron Mountain road. As between the Little Rock & East Tennessee roads the case is that of preferring a road with through facilities to one with only local facilities—a road that goes all the way to one going only part of the way; and the interstate commerce act does not forbid such a preference. Not having as long a track, the facilities offered by the plaintiff road for its through travel into Texas are not the same nor equal or equivalent to those offered by the Iron Mountain, and the discrimination it makes between the two cannot be, therefore, unjust, undue, or unreasonable in any proper sense, however disastrous to the plaintiff. Demurrer sustained, and the bill dismissed at the cost of the plaintiff. So ordered.

Discrimination Between Connecting Lines—Preference in Rates and Facilities.—A preference in rates and business of one connecting line constitutes a discrimination against other connecting lines. Missouri Pac. R. Co. *v.* Texas, etc., R. Co. (C. C.) 28 Am. & Eng. R. Cas. 1; Samuels *v.* Louisville, etc., R. Co. (C. C.) 30 Am. & Eng. R. Cas. 79. But it has been held not to be unlawful for a carrier to pro-rate with one road and not with another, if the rate of the complaining party is reasonable. Missouri Pac. R. Co. *v.* Texas, etc., R. Co. (C. C.) 28 Am. & Eng. R. Cas. 1. The prohibition contained in the constitution of Colorado against discriminating rates has been held not to be violated by refusing to give one connecting road the same arrangements as are given to another. Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co. (U. S.) 16 Am. & Eng. R. Cas. 57. See generally as to discrimination by one company against connecting lines, note 9 Am. & Eng. R. Cas. 384.

Court of Equity Cannot Compel Establishment of Joint Through Rates and Routes.—Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. R. Co. (C. C.) 42 Am. & Eng. R. Cas. 490.

Validity of Act Providing for Establishment of Joint Through Rates.—See Burlington, C. R. & N. R. Co. *v.* Dey (Iowa) 45 Am. & Eng. R. Cas. 391.

SOUTHERN PACIFIC R. CO.

v.

HAAS.

(*Texas Supreme Court, Nov. 3, 1891.*)

Through and Local Rates—Breaking Transit.—Plaintiff shipped goods to a city in a foreign country over two railroads connecting at the border. The through bill of lading provided that if the freight was removed at the connecting point, the shipment should be regarded as a local one to such point, and the full proper rate to such point collected. The plaintiff had knowledge that the local rate was greater than the *pro rata* proportion of the through rate to the connecting point, but intended to withdraw upon payment of the lesser *pro rata* rate. *Held*, that the plaintiff could not withdraw the goods at such point upon payment merely of the *pro rata* which the first road would have received under the through shipment.

Commissioners' decision. Section A. Appeal from El Paso District Court.

Davis, Beall & Kemp, for appellant.

Millard Patterson, C. N. Buckler and *F. E. Hunter*, for appellee.

HOBBY, P. J.—There is no controversy as to the facts in this case. The agreed statement contained in the record shows that the appellee, I. Haas, a wholesale merchant in El Paso, shipped the goods sued for— 9½ barrels and 205 bags of sugar, valued at about $1,545—in October, 1887, at San Francisco, Cal., on appellant's road, to be transported to the City of Mexico. This road extends from said city of San Francisco, via El Paso, to the city of New Orleans. Appellant's road, at El Paso, connects with the Mexican Central Railroad, which runs from the latter point to the City of Mexico, the two roads forming a continuous route from San Francisco to the City of Mexico, via El Paso, which is about 1,200 miles from San Francisco and the same distance from the City of Mexico. The goods were consigned by Haas, as appears from the shipping receipt, to I. Alverez, in the City of Mexico. At the time of the shipment there was a through freight rate or tariff from San Francisco, via El Paso, to Mexico, over defendant's road and connecting line of $2 per 100 pounds on goods of this class, the proportional rate thereof of appellant being 96 cents per 100 pounds, and that of its connecting line (the Mexican

Facts.

Central) being 104 cents per 100 pounds. This was the rate, $2 per 100 pounds at which appellee shipped the sugar. It was the tariff schedule then in force, published and well known to appellee. There was also at that time—the time of shipment— a local rate or tariff on the same class of goods from San Francisco to El Paso, of $1.70 per 100 pounds, which was likewise published and known to appellee, as also to the other merchants of El Paso. The appellee, Haas, states that he "shipped the goods through to Alverez, City of Mexico, and that at the time he shipped them he did not intend they should go through, but intended to take them out at El Paso by paying the defendant their *pro rata* part of the through rate from San Francisco to the City of Mexico; that he did not inform the defendant of his intention at the time of the shipment; that he knew at the time of the shipment that the local rate from San Francisco to El Paso was $1.70 per hundred pounds, and that the proportionate rate to El Paso on a through shipment to City of Mexico was 96 cents per hundred pounds." The shipping receipt, on which the goods were delivered to appellant for transportation, contained a notice to shippers to the effect that a "warehouse had been established at El Paso for the purpose of affording free storage of goods consigned to Mexico while awaiting custom house entry and dispatch," and a further clause as follows: "Free access will be permitted for examination of freight thus stored, but, in the event of such freight being removed from the warehouse by shippers, consignees, or their agents, through any process, it will be treated as an El Paso proper shipment, and full El Paso proper rates collected." Upon the arrival of the goods at El Paso, appellee demanded that they should be delivered to him, and he tendered the proportional rate to which appellant was entitled on the through shipment to the City of Mexico, to wit, $217.07. The appellant claimed the local rate, which, at $1.70 per hundred pounds, amounted to $382.24. The appellee declined to pay this sum, and in October, 1887, seized the property at El Paso by virtue of a writ of sequestration, and paid into court the amount appellant would have been entitled to as its proportional rate of a through shipment. A trial was had before a jury, and on January, 1889, a verdict was rendered in favor of the appellant (defendant below) for the sum of $217.24, and as that amount was tendered in court, judgment was entered for the appellee for the goods. This judgment is before us on appeal by the defendant.

The question in the case is, what rate is the appellant authorized to charge under the proof agreed on? This question is raised in different forms under several assignments,

only one of which is it essential to discuss. The first error assigned is as follows: "The court erred in charging the jury that the plaintiff had the right to stop the goods in controversy at El Paso, and receive the same from the defendant at said place, upon the payment or tender to defendant of the amount of money due defendant for transporting the same from San Francisco, in the state of California, to El Paso, in the state of Texas, as hereinafter explained—that is, 96 cents per 100 pounds. If it was found to be an unjust and unlawful discrimination, etc., you are charged further to determine from the evidence under this charge what was the amount of money due to defendant for transporting said goods from San Francisco to El Paso." In this connection the appellant requested the following instruction: "That under the agreed facts read in evidence by the plaintiff the tariff of charges prescribed in the Mexican through rate marked 'Exhibit C, No. 4,' in said statement, together with the receipt or bill of lading, marked 'Exhibit D,' constituted a contract, in the absence of any fraud or mistake, binding upon both the plaintiff and defendant, and, upon the goods being taken out at El Paso by the election of said plaintiff, the defendant being able and willing to have said goods transported to their destination, by the terms and conditions of said contract the defendant would be entitled to hold said goods until the local tariff rate prescribed in tariff sheet, marked 'Exhibit C,' in said agreed statement, was either tendered or paid; and if you find from evidence that plaintiff did not demand said goods for the purpose of shipping them to the City of Mexico, you will find for the defendant."

Question presented—Assignment in error.

We think there was error in the charge of the court above quoted, and believe likewise that there was error in refusing the special instruction asked. The conceded facts show that appellee, Haas, shipped the goods "at the through rate of $2 per 100 pounds from San Francisco to the City of Mexico, as provided in the tariff schedule then in use by the defendant and by plaintiff and the other merchants shipping over its line of road," etc. This "tariff schedule" provided that shippers should select their custom-house agent or broker in El Paso, and that the freight, on its arrival, should be placed in the joint freight warehouse, awaiting custom-house entry, etc. It further provided that, if such freight was removed from the warehouse by the shippers, their agents, etc., through any process, "it will be treated as an El Paso proper shipment, and full El Paso proper rate collected." It was a through contract of shipment, and we see no reason why the

Plaintiff bound by contract for through shipment.

appellee should not be bound by its terms. It is not pretended that he did not enter into it voluntarily, or that he was ignorant of any feature of it; but it does appear that, with full knowledge that the local rate was $1.70 per 100 pounds on these goods to El Paso, and that by contracting for the payment of the through rate to Mexico he would be able to place them at El Paso for 96 cents per 100 pounds, he entered into the contract, intending at the time, as he states, to take them out at El Paso, and pay defendant its *pro rata* of the through tariff, *i. e.*, 96 cents per 100 pounds. This fact, however, he did not make known to appellant. There can be no doubt that appellee's purpose was to have the goods shipped to El Paso at lower rates than were paid by or demanded of shippers of a like class of freight direct from San Francisco to El Paso; and this purpose was to be accomplished through the instrumentality of the contract of through shipment, entered into with the intention of violating it on the arrival of the goods at El Paso. We do not think the power and process of the courts should be successfully invoked to aid the appellee in the execution of the foregoing purpose. It was a lawful contract, and binding on appellee. Therefore the court should have given the special instruction requested, and should not have given the charge first mentioned.

Plaintiff could not remove goods on payment of pro rata.

It is claimed by appellee that, as 96 cents per 100 pounds was all that the appellant would have received as its proportional rate of the through shipment, and that, as this amounted to $214.27, and the verdict was for defendant for the sum of $217.27, hence the appellant has no just cause for complaint. This is based on the statement of the witness J. Budd, who testified that "he was the joint agent of the several roads centreing at El Paso, and at the time of the shipment in this case he was in charge of the joint warehouse, used in receiving all goods consigned to parties in Mexico. That on the shipment of goods to Mexico they often go through in the same cars, and, if these goods of Mr. Haas had not been taken out by him at El Paso they might have gone through to the City of Mexico in the same cars. Where goods arrive destined to the City of Mexico, they may be passed through the custom-house by examination in cars, and custom duties paid. Sometimes the goods are taken out of the defendant's cars at El Paso by shippers, and taken by them across the river in wagons, and by the shippers passed. Most frequently the goods are delivered to the owner's broker for the purpose of having the duty paid, and passing them through the custom-house. The broker in such cases receipts the defendant for the

goods, passes them through the custom-house, and delivers them to the Mexican Central Railway on the other side of the river. Had Mr. Haas applied to defendant for these goods for the purpose of passing them through the custom-house for reshipment by the Mexican Central Railway Company, they would have been delivered to him upon payment of 96 cents per hundred, and his receipt taken for them, and defendant would have had nothing further to do with them. Had the goods been shipped through to the City of Mexico, defendant would have received only 96 cents per hundred pounds, which was the amount tendered by the plaintiff." This evidence merely shows that Haas might have had the right to pay appellant only 96 cents per 100 pounds on the goods if, as provided in the contract, he had applied to the warehouse agent for the purpose of passing them through the custom-house for re-shipment to the City of Mexico. There is nothing in the evidence indicating that he demanded the goods from the agent for the purpose of reshipment, which was the only condition, according to this witness, on which he could claim the right to pay appellant 96 cents per 100 pounds. If, then, he did not avail himself of the contingency which alone would have authorized him to pay said sum, that fact would afford no support for his contention now that that amount was all appellant was entitled to. It amounts to this: that because appellant would have received only 96 cents per 100 pounds on this freight if appellee had complied with his contract, appellant should now receive that sum, notwithstanding appellee has violated it, knowing that such violation, under its terms, would subject him to the payment of and entitle appellant to receive full local rate,—$1.70 per 100 pounds. Under the plain terms of the contract, he could not remove the goods, in the manner shown in this case, without becoming liable for the local rates thereon.

It is urged by appellee that the local tariff on appellant's road to El Paso, considered in connection with the joint tariff rate under which the shipment was made, discriminated unlawfully and unjustly against El Paso and her wholesale merchants in favor of the City of Mexico and wholesale distributing points along the line of the Mexican Central Railway in the republic of Mexico, etc. There is no proof whatever of an unjust and unlawful discrimination, as claimed, even under our statute; and, if there was such proof, it is a sufficient answer to this to say that a "state can make no law regulating the rate of freight for the transportation of goods between that and another state, and this is so where the regulation prescribed is construed as applying only to the line of the road within

Discrimination against El Paso.

the territorial limits of the state." Thhis rule is laid down and thoroughly discussed by Judge GAINES in Gulf, C. & S. F. R. Co.*v.* Dwyer, 75 Tex. 572, 42 Am. & E. R. Cas. 503, and nothing more than a reference to it and the authorities there collated is necessary on this question. It is proper to add that there is no evidence of any unlawful and unjust discrimination against the city of El Paso and her merchants, as alleged. The unjust discrimination which the proof in this case suggests would grow out of permitting the appellee, Haas, to use the contract of shipment as a cloak under which he secures the transportation of the goods from San Francisco to El Paso for 96 cents per 100 pounds, when other merchants in El Paso would have to pay $1.70 per 100 pounds on such goods to the same place. We think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Reversed and remanded, as per report of the commission of appeals.

MOBILE & OHIO R. CO.

v.

DISMUKES.

(*Alabama Supreme Court, Nov. 27, 1891.*)

Interstate Commerce Act—Freight Contract Departing from Schedule Rates—Rights of Shipper.—It is not in the contemplation of the interstate commerce act that persons dealing with common carriers should be held to a knowledge of what their published schedules of rates contain. Accordingly, a shipper who contracts with a carrier for the shipment of goods at a rate less than that given in the published schedule, of which he is unaware, is not *in pari delicto* with the carrier, and is entitled to receive the goods at the point of destination upon tender of the freight charges at the rate set down in the bill of lading.

State Law Prohibiting Exorbitant Charges — Application to Interstate Shipments.—A state law providing that carriers exacting exorbitant charges for freight are guilty of extortion, and are liable to the party injured in double the damages sustained, has no application to shipments over lines without the state.

Appeal from Mobile Circuit Court.

E. L. Russell, for appellant.

Sheton Sims, for appellee.

MCCLELLAN, J.—A statute of this state (Code, § 1159), provides that "any person or corporation engaged in the business of transporting passengers or freights over any railroad in this state who shall exact and receive more than just compensation therefor, or demands

Facts.

more than the rates specified in any bill of lading issued for such freights * * * is guilty of extortion, and is liable to the party injured in double the damages sustained," etc. The act of Congress, known as the "Interstate Commerce Law," of Febuary 4, 1887, as amended by acts approved March 2, 1889, makes it unlawful for any common carrier to issue bills of lading at rates, or to demand or receive freight charges variant from the rates, established and published as therein prescribed, and filed with the interstate commerce commission; and this, whether the carriage in a given instance is by one common carrier, or by more than one, having traffic arrangements and a joint tariff of charges. Not only so, but it is also made unlawful for any person or corporation, by what means soever, and whether with the consent and connivance of the carrier or otherwise, to knowingly obtain transportation at less than the regular rates at the time in force on the line of transportation; and the infraction of the statute in the particulars referred to, as well by consignors and consignees as by carriers, is made a highly penal offense. In the case at bar the Mobile & Ohio Railroad Company received at Cairo, Ill., certain goods of the value of about forty dollars for transportation to Sunny South, Ala., a station on the Mobile & Birmingham Railway, with which the initial line connected at Mobile, Ala.; and delivered to the shipper a bill of lading whereby it was undertaken to transport the goods over the two roads in question to Sunny South, and there deliver them to H. C. Dismukes, for a compensation of five dollars and forty-four cents. There was at the time a joint tariff of rates in force between the Mobile & Ohio and the Mobile & Birmingham Railway Companies between the initial and terminal points of this shipment, which had been duly filed with the interstate commerce commission, approved, promulgated, and published in consonance with the act of Congress; and, according to the rates fixed in this schedule the freight charges on this consignment were, or should have been, $29.30. On arrival of the goods at Sunny South, the consignee tendered to the agent of the Mobile & Birmingham Railway Company $5.44, the amount of charges stipulated in the bill of lading, and demanded the property. This demand was refused, the insistance being that, the bill of lading to the contrary notwithstanding, the consignee was liable for the schedule rate of $29.30; and thereupon the consignee instituted this action for the value of the goods as upon a failure to deliver the same to him, before a justice of the peace, whence, on judgment for plaintiff, an appeal was taken to the circuit court, where a trial *de novo* was had before the judge without jury

on agreed facts. Judgment was again entered for plaintiff in the circuit court, and from that judgment this appeal is prosecuted, presenting for review the conclusion of the trial judge on the facts.

The statute of Alabama which we have quoted is relied on in support of the judgment. We do not think any aid can be derived from that source. The shipment—the transportation being from a point in Illinois, through the states of Kentucky, Tennessee, and Mississippi, into Alabama—was an act of interstate commerce, and clearly within the laws of the United States regulating that commerce. It of course cannot be doubted that Alabama is without power to declare what rates of charge in respect of such commerce shall amount to extortion on the part of the carrier, or to declare that the demand for an amount of freight charges which the carrier is authorized under the act of congress to impose is rendered extortionate by reason of the fact that a less amount is stipulated to be paid and received between the parties to the bill of lading. To hold otherwise would be to give paramount efficacy to state regulation of a subject which is not only within exclusive national control, but with respect to which national legislation has already provided all regulations deemed necessary or expedient. Our statute may, no doubt, be looked to as determining what is extortion in freight charges for transportation within the state, and also, it may be, as affording a remedy and measure of redress for extortion in interstate shipments, but not as declaratory of what shall constitute extortion in transactions of the class last named.

State law not applicable.

But, leaving the Alabama statute out of consideration, there is an element of contract in this case which, in our opinion, upon the agreed facts, will support the judgment below. The Mobile & Ohio Company agreed and bound itself to carry this consignment to Sunny South, Ala., and there deliver it to Dismukes, for a certain compensation That company had no right, under the law and its tariff of rates adopted, approved, and promulgated as by the law provided, to enter into any such contract; and so far as the company is beneficially concerned in it, so far as the contract might otherwise be relied on by the carrier against the consignee, it is void, as being in the teeth of the law of Congress, as the same has been put into practical operation, upon the carrying business of the company. But it by no means follows that the consignee has no rights under it, or, indeed, any less or other right than would have been his had the

Shipper not affected by carriers' illegal contract.

rate set down in the bill of lading been the approved rate for the transportation. It nowhere appears that either the consignor or consignee knew that the stipulated rate was different from the approved rate. It is not in the contemplation of the interstate commerce law that persons dealing with common carriers should be held to a knowledge of what their published schedules of rates contain. These schedules are no part of the law which all men are held to know, but are resultants *in pais*, so to speak, of the acts of the carrier, and of the interstate commerce commission, done under and in execution of the law. There is nothing in the law which forbids shippers to contract for transportation at other rates than those specified in these schedules. It is only when the shipper knowingly contracts for a rate differing from that therein prescribed that his act is denounced as unlawful and punished as a crime. The motive of this legislation, moreover, is the protection of persons dealing with common carriers. Its primary purpose is to prevent a resort on the part of carriers to the undue advantages which accrue to them from the circumstances of their relations to persons having need for their services. The provisions of the law should not be so strained or contorted as to defeat its purposes, and convert the shield it was intended to afford the unwary shipper, who has no choice but to patronize the carrier, into a sword with which to work his destruction more certainly and completely than would have been possible had not the arm of the government been put forth in his behalf. To allow the carrier to draw the shipper, entirely ignorant of the schedule of rates approved by the commission, into a contract of affreightment, upon which the goods are delivered and carried, at a stipulated rate which the shipper can afford to pay—as in this instance about 12 1-2 per cent. of the value of the property—and then to refuse to deliver the shipment to the consignee, except upon payment of a rate which he cannot afford to pay—in this instance, 75 per cent. of the value—and upon which the property would not have been shipped at all, would be to put a construction on the law of Congress which its terms do not require or justify, and which would defeat the purposes which actuated its enactment. True it is that the contract here is one which the Mobile & Ohio Company had no right to make. True it is that its execution on their part involved a crime. But the act of the shipper in entering into it is not, in the absence of knowledge on his part of the schedule rate, tainted with criminality or violative of any provision of the interstate commerce acts. He is not *in pari delicto* with the contracting carrier; and he is entitled to the protection of that prin-

ciple of law which enforces such a contract in behalf of the innocent party to it—a principle which we conceive to be logically sound and thoroughly settled upon authority. See Tracy *v.* Talmage, 14 N. Y. 162, and numerous later cases, which are cited and discussed in a note to that case as reported in 67 Amer. Dec. 153. Affirmed.

BAGG

v.

WILMINGTON, COLUMBIA & AUGUSTA R. CO.

(North Carolina Supreme Court, December 23, 1891.)

Interstate Commerce—Validity of Statute Imposing Penalty for Detention of Freight.—It is only such legislation by the states as impedes, obstructs, or controls interstate commerce, or comes in conflict with some statute passed by congress to regulate it, that is inhibited by the federal constitution. State laws which operate uniformly in aid of both domestic and interstate trade alike, upon a subject concerning which congress has not acted or has not the authority to afford so complete a remedy for the evil, are constitutional. Accordingly, *held*, that a statute (Code N. Car., § 1967) imposing a penalty on railroad companies for the detention of freight more than five days after delivery for shipment, without the consent of shipper, the as regards freight to be shipped to another state, is not a regulation of interstate commerce.

APPEAL from New Hanover Superior Court.

This was a civil action, brought to recover a penalty imposed by section 1967 of the Code for detention of freight more than five days after delivery for shipment without the consent of the consignor, tried before ARMFIELD, J., at September term, 1890, of the superior court of New Hanover county. The termini of the defendant's road are one in North Carolina and the other in South Carolina. The goods were consigned by a shipper in Wilmington, N. C., to a person at a station on defendant's line in South Carolina. The court intimated an opinion that the statute was unconstitutional as to freight shipped beyond the limits of the state of North Carolina, and that the plaintiff could not recover. Plaintiff thereupon submitted to a judgment of nonsuit, and appealed.

Geo. Rountree, for appellant.

Junius Davis, for appellee.

AVERY, J.—The power to regulate commerce among the several states, as well as with foreign nations, was delegated to the federal government in pursuance of a preconceived

purpose on the part of the leading representatives of public opinion to provide for and promote the free and unrestricted sale and interchange of commodities between the states. It appears from contemporaneous history of the condition of the country, especially from the journals of the general assemblies of the states and of the federal convention, that there was a deep-seated desire in all parts of the Union to establish a uniform system of commercial regulation, such as would prohibit one state from imposing burdens upon the business of citizens of other states, whether by a tax upon their persons or property *in transitu*, on their goods when offered for sale, or by an impost tax. 1 Elliott, Deb. 140; 5 Elliott, Deb. 540. The earlier cases that gave rise to the construction of this clause of the constitution were chiefly controversies as to the right of a state to levy a tax upon passengers or products passing through and along its highways to a market beyond its orders. The test of constitutionality to which every doubtful state statute was subjected was involved in the inquiry whether its enforcement would tend to trammel the trade between citizens of different states or embarrass them in passing from one to another. The idea was crystallized by Justice STRONG in the definition of "regulating commerce," given by him in Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 470, to-wit: "Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority, is regulation." Ward *v.* Maryland, 12 Wall. (U. S.), 418; Case of State Freight Tax, 15 Wall. (U. S.), 232; Welton *v.* State, 91 U. S. 275; Henderson *v.* Mayor, of N. Y. 92 U. S. 259; Chy Lung *v.* Freeman; *Id.* 275. "Commerce," said Chief Justice MARSHALL, "undoubtedly is traffic, but it is something more; it is intercourse." The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and, under our system of government, is vested in the legislatures of the several states of the Union; the only limit to its exercise being that the statute shall not conflict with any provision of the state constitution, or with the federal constitution, or laws made under its delegated powers. Martin *v.* Hunter's Lessee, 1 Wheat. (U. S.), 326; State *v.* Moore, 104 N. Car. 714; State Tax on Railroad Gross Receipts, 15 Wall. (U. S.), 284. So long as the state legislation is not in conflict with any law passed by congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce, and to expedite instead of hindering, the safe transportation of persons or property from one common-

Interstate commerce—Exclusive power of congress.

wealth to another, it is not repugnant to the constitution of the United States, and will be enforced either as supplementary to partial federal statutes relating to the same subject, or in lieu of such legislation, where congress has not exercised its powers at all. Morgan, L. & T. R. & S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455; Train *v.* Boston Disinfecting Co., 144 Mass. 523, 19 Am. & Eng. Corp. Cas. 548; Smith *v.* Alabama, 124 U. S. 465, 33 Am. & Eng. R. Cas. 425; Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96; 38 Am. & Eng. R. Cas. 1; Welton *v.* State, 91 U. S. 275; Chicago & N. W. R. Co. *v.* Fuller, 17 Wall. (U. S.), 560.

The power of congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. Cooley, Const. Lim. 595; County of Mobile *v.* Kimball, 102 U. S. 697; Wilson *v.* McNamee, *Id.* 572; Wilson *v.* Black Bird, Creek Marsh Co., 2 Pet. (U. S.), 245; Pound *v.* Turck, 95 U. S. 459; Turner *v.* Maryland, 107 U. S. 38; Morgan, L. & T. R. & S. S. Co. *v.* Louisiana Board of Health, *supra*. Familiar instances of statutes falling within the foregoing exception are found in those relating to harbor pilotage, beacons, buoys, the improvement of navigable waters, the examination as to fitness of engineers and other railroad employes, and which are discussed by the courts in the cases cited above. The validity of these and other state laws, which relate directly to, or indirectly affect, commerce between the states, has been sustained upon the ground, either that the particular statute upon its face appeared to have been passed for the purpose of expediting the safe transportation of persons and property, or in the exercise of police powers, which it is more convenient to leave subject to local legislation, such as the building of bridges over inland navigable streams.

Where the manifest tendency of enforcing such laws has been, as far as could be foreseen from their terms, to impede the free and expeditious conduct of commerce over interstate lines by land or water, they have been declared repugnant to the organic law, and void, even where congress had failed to legislate on the branch of the subject to which they relate. The futile attempts by state legislatures either to give exclusive privileges to a particular telegraph company, or to subject telegraph companies generally to such license tax or tax on mes-

Validity of state legislation.

sages as would imply the right to destroy their business by burdening them with such imposts, illustrate the view which we have submitted, that, where congress has not exercised a police power comprehended under the general authority to regulate commerce, the states may exercise the power to aid, but not to impede or obstruct, it. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1.; Western Union Telegraph Co. *v.* Texas, 105 U. S. 460; Leloup *v.* Port of Mobile, 127 U. S. 640, 21 Am. & Eng. Corp. Cas. 26. The supreme court of the United States has also, in a long line of cases, passed upon the power assumed by some of the states to impose a tax on persons or goods *in transitu* to another state, —a license tax upon traveling salesmen, who might offer to sell within their borders merchandise manufactured in or commodities shipped from another state, before such articles of commerce should become intermingled with its own products. These adjudications within the last decade marked much more clearly the line to which congress may rightfully claim exclusive authority to legislate, and have also indicated more definitely the limit to which the states may still cross that boundary in the exercise of permissive police power. The controlling principle which pervades all of them is that only such legislation by the states is inhibited as impedes, obstructs, or controls commerce, or comes in conflict with some statute passed by congress to regulate it. Robbins *v.* Shelly Taxing Dist. 120 U. S. 489, 61 Am. & Eng. Corp. Cas. 1; McCall *v.* California, 136 U. S. 104, 45 Am. & Eng. R. Cas. 1; Asher *v.* Texas, 128 U. S. 129, 23 Am. & Eng. Corp. Cas 69; Lyng *v.* Michigan, 135 U. S. 166; Walling *v.* People, 116 U. S. 446, 11 Am. & Eng. Corp. Cas. 383; Inman S. S. Co. *v.* Tinker, 94 U. S. 238; *In re* Rahrer, 140 U. S. 545; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465; 23 Am. & Eng. Corp. Cas. 236; Philadelphia, & S. S. S. Co. *v.* Pennsylvania, 122 U. S. 326. In Hannibal and St. J. R. Co. *v.* Husen, *supra*, Justice STRONG, delivering the opinion, said: "Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term; and it is sometimes difficult to distinguish between that which merely affects or influences and that which regulates or furnishes a rule of conduct. * * * While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent animals suffering from contagious or infectious diseases, or convicts, from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with transportation into or through the state beyond

what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police power substantially prohibit or burden either foreign or interstate commerce." In Welton *v.* State, 91 U. S. 282, it is said: "The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered in reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled." In Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 358, 18 Am. & Eng. Corp. Cas. 18, Justice FIELD says: "In these cases, the supreme authority of congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the state can impose no impediments to the freedom of that commerce." In Walling *v.* People, 116 U. S. 446, 11 Am. & Eng. Corp. Cas. 383, Justice BRADLEY, speaking for the court, says: "We have repeatedly held that so long as congress does not pass any law to regulate commerce among the several states it thereby indicates that such commerce shall be free and untrammeled." Brown *v.* Houston, 114 U. S. 631.

When we come, therefore, to the application of the authorities to the case at bar, the question arises at the threshold of the inquiry whether the statute which is drawn in question would, in its enforcement, tend to trammel or obstruct the trade carried on between the states, and not whether it might remotely influence it. The statute (Code, § 1967) which was declared to be repugnant to the constitution of the United States in the court below is as follows: "It shall be unlawful for any railroad company operating in this state to allow any freight they may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped to any person suing for the same." Neither the act of congress passed in 1887 to regulate commerce, nor the amendatory act of 1889 prescribes the time or the manner in which freight received for shipment to another state shall be forwarded, nor do these statutes clothe the commission with power to regulate the time of shipment. Therefore if the defendant company, whose line extends into the section of our state where many farmers are engaged in raising vegetables for sale in northern cities, should, for the purpose of stimulating production in a state further south, and more remote from the markets, fail

The statute in question--The evils remedied.

to furnish transportation to this class of persons known as "truckers" for more than five days, and thereby give to the planters of South Carolina the exclusive benefits of the markets till vegetables of the same kind then mature here should ripen in Virginia, the producers would suffer loss without adequate remedy, because no provision is made in any national law for preventing such secret preference. It would be almost impossible, in the very nature of things, to prove the existence of such a purpose, though in fact entertained and acted upon by some agent in control of the through line, or in any way to show that in a system so extensive and complicated the injury was due to any cause other than undesigned and unavoidable accident. In the same way, in the absence of a state statute imposing a penalty or any other local legislation on the subject, facilities for shipment may be furnished more promptly to one town or station than to another neighboring one, and thereby its business may be injured and its improvement retarded. No other compulsory law could be conceived of that is calculated to operate so uniformly in insuring the shipment of both local and interstate products without preference to one class of shippers over another, or to one station over a neighboring one. If the evil to be remedied were the habit of giving the preference to through freight consigned to another state over local shipments to points within the state, where is the power to compel fairness lodged? The power delegated to congress to control through shipments would not warrant the enactment of a law going further than to prohibit unfairness and insure promptness in transporting goods shipped to another state. If, then, the authority of the state is confined to such legislation as will apply to and insure uniformity and dispatch in forwarding freight to points within its own territory, how could the evil of giving advantage either to the through or local shipper be corrected? Surely, as between the federal legislature acting under well defined and delegated powers, and the states that have retained and may exercise all the residuary authority to provide by statute for the protection of its citizens, subject only to the restraints of their own organic law, the right should be conceded to the latter without question.

It is settled that the statute under consideration is valid, as to the transportation of freight to points within the state, and so far may be enforced in the state courts, just as the license taxes could be collected from persons selling the products of the state that imposed them, and within its limits. If we concede then that each power, state and national, is sovereign and ex-

Statute not a restriction on commerce.

clusive within its own domain in dealing with the problem of expediting shipments, we have located the authority to regulate the conduct of each class of consignments *inter sese*, and it might be exercised if the statutes so provided by two railroad commissions supplementing each other. But when the interests of state and interstate traders conflict, and such regulation is needed as will prevent corporations from giving undue preference to either over the other, under this theory it would seem that the states have neither delegated nor reserved the right to afford such relief by appropriate legislation, but that, in the transfer of delegated authority to the federal Union, this power, so conducive, if not essential, to the public weal, has been lodged *in nubibus*, beyond the reach of either. There is nothing upon the face of the statute, as in that discussed in Robbins *v.* Shelly Taxing Dist., *supra*, to show that it was intended to operate, or does operate, as a restriction upon the interstate commerce. On the contrary, the enforcement of the penalty is at once a stimulus and a compensation placed within the reach of every one who consigns his freight to another state, and he may avail himself of its aid as an incentive to promptness, to the same extent as the local shipper may do. In fact, the controversy before us has its origin in a failure to ship goods to another state, and we are asked to declare the law invalid when its aid has been invoked to expedite interstate commerce, and to thereby leave the defendant at liberty to embarrass such traffic, not by legislation, but by inaction or unfair conduct.

Statute incidentally affecting commerce not invalid.

It was contended on the argument that a state could not compel railroad companies doing business between states to provide cars for removing freight within a given period without risk of impairing the facilities for shipment from the adjacent state by withdrawal of the companies' cars from it. That is an evil that may be met and provided against by the enactment of a similar statute in the adjacent state,and thus forcing the company to provide an adequate supply of cars to remove its freight without delay. Besides, the same result would as naturally follow if the statute were limited in its operations to compelling the removal of freights consigned to points within the state; and, if the argument were allowed to influence us at all, we would be driven to the conclusion that the penalty cannot be recovered, even where the agreement is to ship the freight to a station in North Carolina. Cars cannot be provided for the shipment of local freight if they are moved to particular points, not to fulfill a duty to persons who have been induced by the invitation of the carriers to intrust goods to their care, but to avoid the consequences

of disregarding a penal statute without influencing to some extent the business of the whole line. Where these arteries of trade have termini in different states, or where they are entirely within a single state, but constitute a part of a long through line formed for the purpose of competing for business with other similar lines, it would be as certainly impossible to interfere in any way with any branch of the system, whether located entirely within one or situate in two states, without to some extent affecting the whole line, as it would be to check the flow of blood in a vein of one's arm, or to temporarily open the vein without influencing the action of the main artery of that arm.

This case illustrates the distinction drawn by Justice STRONG in Hannibal & St. J. Co. *v.* Husen, *supra*, between a state statute that affects or influences incidentally, even to the slightest extent, the transportation of commodities from one state to another, and one that is palpably intended to embarrass such commerce, and trammel it by restrictions, especially where, in addition, there is a plain discrimination in favor of the local trade of production. Neither the clause of the constitution which we have considered, nor any other, has been construed to interfere with "the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Barbier *v.* Connolly, 113 U. S. 27, 7 Am. & Eng. Corp. Cas. 640; Mugler *v.* State, 123 U. S. 623, 18 Am. & Eng. Corp. Cas 614. The palpable purpose of the legislature in enacting our statute was to stimulate trade, and develop the resources of its people. It throws the *ægis* of state protection alike over freight consigned under the care of the state and that of which the general government has the right of supervision. The requirements of a state law that locomotive engineers be examined as to the condition of their eyes, to determine whether they were color blind and as to fitness generally, and requiring them to have a license, have been declared valid under the general authority to protect life, health, and property; yet such statutes interfere with and affect, but do not obstruct, commerce between the states. Smith *v.* Alabama, *supra;* Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96, 38 Am. & Eng. R. Cas. 1. In Smith *v.* Alabama the court said: "If the state has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable

vehicles or employes of sufficient skill and knowledge, or in not properly conducting or managing the act of transportation, why may not the state also impose, on behalf of the public, as an additional means of prevention, penalties for the non-observance of these precautions?" Justice FIELD, in delivering the opinion of the court in Nashville, C. & St. L. R. Co. *v.* Alabama, *supra*, said: "It is conceded that the power of congress to regulate interstate commerce is plenary; that as incident to it, congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; that such legislation will supersede any state action on the subject. But until such legislation is had it is clearly within the competency of the states to provide against accidents on trains while within their limits."

If it is not only the right, but the duty, of state legislatures to provide for the safety of persons alike of its own citizens and those of other states passing across its territory on trains, by such legislation as congress had plenary power to pass, if it had chosen to exercise that power, it would seem doubly due to all persons interested in the traffic conducted along the railway lines which cross it that their property intrusted to the corporations owning them should be protected by proper legislation, especially if the power of congress in the premises is not plenary, and there is no authority lodged anywhere except in the states to pass a statute that will operate uniformly and on all classes of freight. It is true that section 1967 has been modified so as to give persons injured by failure to ship within five days the right to recover double the amount of damage actually sustained. Laws 1891, chap. 520. But by its terms the statute does not apply to actions pending in the courts, so as to affect the right to recover the prescribed penalty. We might add that though congress has plenary authority over whiskey stored in a government distillery, and in the custody of a gauger, it is nevertheless larceny to steal such whiskey. State *v.* Harmon, 104 N. Car. 792; State *v.* Cross. 101 N. Car. 770; State *v.* Bishop, 98 N. Car. 773. In like manner, national banks are the creatures of the general government, and subject to such supervision and regulation as congress may provide for; yet the state may protect the property of such banks by punishing the forgery of a note to defraud it. Cross *v.* North Carolina, 132 U. S. 132. Where, therefore, the state legislature, without discrimination, passes a law which operates uniformly in aid of domestic and interstate trade alike, and congress has not acted, or has not the authority to afford so complete a remedy for the evil as the

state legislature, there can be no question about the validity of such legislation or the duty of the state courts to enforce it. McGwigan's Case, 95 N. Car. 432, presented a question widely different from that raised by this appeal. That case involved a construction of section 1966 of the Code, which was an act, by its terms, prohibiting the exaction of a greater charge for hauling freight a shorter distance over a given line than is charged by the same carrier for transporting freight of the same class to a greater distance in the same direction. If the statute had been enforced as to shipments beyond the limits of the state, it would have been clearly an invasion of the exclusive domain of congress, and would have provided for one of the most flagrant abuses on the part of carriers of goods shipped from one state to another that has been remedied by the more recent act of congress. The court there conceded that the regulation of charges was operative within, though not beyond, the boundaries of the state. The passage of that statute was, as to its operation beyond our lines, an undisguised attempt to interfere with commerce by regulating charges, and not an effort to aid such traffic by speeding shipments to their appointed destination. We think that there was error in the ruling of the court below that the plaintiff could not recover because the goods were consigned to a point beyond the limits of the state, and a new trial must therefore be granted.

Interstate Commerce—Validity of State Statutes Imposing Penalties in Relation to the Shipment and Delivery of Freight.—The Texas statute which imposes a penalty upon railroad companies refusing to deliver freight upon payment or tender of the charges specified in the bill of lading, is not, even when applied to freight shipped into the state, a regulation of interstate commerce, but is a proper exercise of the police power of the state, and is valid. Gulf C. & S. F. R. Co. *v.* Dwyer, 75 Tex. 572, 42 Am. & Eng. R. Cas. 503; Ft. Worth & D. R. Co. *v.* Lillard (Texas Court of Appeals) 16 S. W. Rep. 654. And a statute which imposes a penalty upon railroad companies for allowing any freight they may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the company and the shipper, is a valid act. Whitehead *v.* Wilmington & W. R. Co., 87 N. Car. 255, 9 Am. & Eng. R. Cas. 168.

BENNETT

v.

AMERICAN EXPRESS CO.

(*83 Maine 236.*)

Carriers—Prima Facie Evidence of Negligence—Burden of Proof.—Ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation and its non-delivery to the consignee, are *prima facie* evidence of negligence. The burden then rests upon the carrier to show facts exempting it from liability.

Unlawful Seizure of Property in Hands of Carrier.—The property of the plaintiff, while lawfully in the possession of the defendant as a common carrier, was seized unlawfully by an officer, without any warrant or legal process, nor was any afterwards obtained. *Held*, that the officer was a trespasser, and that the common carrier was liable in the same manner as if it had allowed any other trespasser to take the property out of its custody.

Game Laws—Application to Common Carrier.—Rev. St. chap. 30, § 12, which imposes a penalty for killing, destroying, or having in possession, during certain portions of the year, "more than one moose, two caribou, or three deer, does not apply to common carriers in the performance of their duties.

Duty of Carrier to Transport Property Outside of State.—When property is rightfully delivered to a common carrier to be transported to a point outside the limits of the state, the duty of the carrier is not merely to transport the property in the state, but to such point outside the limits in another state.

When Property Becomes Subject of Interstate Commerce.—Where such property has lawfully commenced to move as an article of commerce from one state to another, that moment it becomes the subject of interstate commerce, and, as such, is subject only to national regulation.

Same—Agency Used as Means of Transportation.—The same is true in relation to whatever agency may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale, or exchange, under the commerce clause of the constitution of the United States.

RESERVED case from Penobscot Supreme Judicial Court.

Action on the case to recover the value of the saddles of three deer.

F. J. Whiting, for plaintiff.
Barker, Vose & Barker, for defendants.

FOSTER, J.—It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer, which

were legally killed under the laws of this state; that the same were closely boxed in good condition for shipment, and delivered by the plaintiff on to the platform of the Maine Central Railroad Company at Newport station, plainly marked to the consignees in Boston. The defendants' agent was notified that the box was left for transportation, and thereupon he delivered it into the defendants' car on the arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game-warden, and by him removed from the defendants' car, without any search-warrant or other legal process, and without objections from the defendant company or their agents, and have never since been delivered either to the consignees or the express company.

Case stated.

Upon the facts thus stated, the defendants' liability is fully established. The plaintiff's ownership of the property, its delivery to the defendants for transportation, and their acceptance for that purpose, and its non-delivery to the consignees, are *prima facie* evidence of negligence. The burden is therefore upon the defendants to show facts exempting them from liability. Little *v.* Boston & M. R. Co., 66 Me. 241.

Prima facie evidence of negligence.

The property of the plaintiff while in the hands of the defendants as common carriers, *in transitu*, was seized by an officer without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was therefore a mere trespasser, and the defendants were liable, under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the property out of their custody. Edwards *v.* Transit Co., 104 Mass. 163. As against the plaintiff, the seizure was of no more validity than a trespass by an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfilment of his contract, or his liability as such carrier, any more than if the loss had occurred from fire, theft, robbery, or accident. He stands in the relation of insurer, where, as in this case, no special contract is shown, and upon grounds of public policy is liable for all losses resulting from accident, trespass, theft, or any kind of unlawful disposition of the property intrusted to him to carry excepting only such as arise by the act of God or public enemies. Adams *v.* Scott, 104 Mass. 166; Kiff *v.* Old Colony & N. R. Co., 117 Mass. 593; Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462.

Seizure of property by officer.

In the case of Edwards *v.* Transit Co., *supra*, it was held that, while the carrier was not liable in trover for conversion of the property, he was nevertheless liable on his contract or obligations as common carrier, where the officer seizing the property was a trespasser. "The owner may, it is true," say the court, "maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him."

Application of game law to carrier.

But the defendants claim exemption from liability in this action on the ground that the property was put into their possession fraudulently; that having had in their possession, and transported during the year, after the 1st day October, and before the time when this property was delivered to them, three deer from Newport station, to places beyond the limits of the state, they directed their agents not to receive for transportation any deer or parts thereof, and that this fact was known by report to the plaintiff before he delivered the box to the defendants' agent.

Notwithstanding these facts may all be true, they constitute no defense to this action. The statute invoked by the defendants (Rev. St. chap. 30, § 12) is as follows: "Whoever kills, destroys, or has in possession between the first days of October and January more than one moose, two caribou, or three deer forfeits one hundred dollars for every moose, and forty dollars for every caribou or deer, killed, destroyed, or in possession in excess of said number; and all such moose, caribou, or deer, or the carcasses or parts thereof, are forfeited to the prosecutor. Whoever has in possession, except alive, more than the aforesaid number of moose, deer, or caribou, or parts thereof, shall be deemed to have killed or destroyed them in violation of the law."

The defendants claim that under this statute they could not lawfully take any more deer, or parts, thereof, into their possession for transportation before the following January.

But we cannot adopt such a construction of this statute as would make it apply to common carriers. Such construction as claimed by the defendants would make it unlawful for the carrier to transport, between the 1st days of October and January, the carcasses of moose, caribou, or deer lawfully killed before the 1st day of October. Laying aside all constitutional questions, for the present, in relation to the doctrine of interstate commerce, it is sufficient to say that it was not the intention of the legislature so to ap-

ply it. The statute, like many others, may in general terms be broad enough to embrace corporations as well as natural persons within its prohibition. But its construction must be such as was evidently intended by the legislature. That intention, to some extent, may be ascertained by taking into consideration the evil sought to be remedied. Such was the decision of this court in its construction of the section following the one now under consideration. Allen *v.* Young, 76 Me. 80. In that case it was held that the transportation of the hide or the carcass of a deer from place to place in this state is not unlawful if the deer was killed at a time when it was lawful to do so, notwithstanding the statnte in express terms provides that whoever carries or transports from place to place the carcass or hide of any such animal, or any part thereof, during the period in which the killing of such animal is prohibited, shall forfeit the sum of $40. Certainly that language is as broad, comprehensive, and imperative as that of the statute invoked in this case. Yet the court aptly remarked that it could see no possible motive for making such transportation a crime. To the same effect was the decision in State *v.* Beal, 75 Me. 289. "The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed." U. S. *v.* Freeman, 3 How. (U. S.), 557, 565; Holmes *v.* Paris, 75 Me. 559, 6 Am. & Eng. Corp. Cas. 1, and authorities there cited.

The box was delivered to and received by the company. No information was asked concerning its contents, and none given. If the plaintiff knew by report, when he delivered the property to the defendants, that their agents had been directed not to receive any deer or parts thereof, yet there was no limitation of the company's responsibility by special contract, or such knowledge brought home to this plaintiff and assented to by him as would be necessary to limit such responsibility. Fillebrown *v.* Railway Co., 55 Me. 462. "A carrier may limit his responsibility for property intrusted to him," says BIGELOW, C. J., in Buckland *v.* Express Co., 97 Mass. 125, "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which

No limitation of defendants liability.

the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered."

It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised, as well as the amount of compensation for the carriage of property, depends largely on its nature and value; and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes. But we fail to see any such evidence of fraud or deception in this case as would exonerate these defendants.

No fraud or deception shown.

This property was lawfully the property of the plaintiff. It was delivered to and accepted by the defendant company for transportation to a point beyond the limits of this state. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this state, but to a point outside of its limits in another state. It had lawfully commenced to move as an article of commerce from one state to another. From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the state. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale, or exchange under the commerce clause of the constitution of the United States. The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold, or exchanged, is without doubt a constituent of commerce itself, and is protected by and subject only to the regulation of congress. The Daniel Ball, 10 Wall. (U. S.) 557, 565; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 485; County of Mobile *v.* Kimball, 102 U. S. 691; Welton *v.* Missouri, 91 U. S. 275; Coe *v.* Erroll, 116 U. S. 517, 11 Am. & Eng. Corp. Cas. 456, Leisy *v.* Hardin, 135 U. S. 100.

Defendant's obligation to transport—Interstate commerce.

Defendants to be defaulted, damages to be assessed at *nisi prius*.

PETERS, C. J., and LIBBEY, EMERY, HASKELL, and WHITEHOUSE, J. J., concur.

What Constitutes Interstate Commerce—Shipment to Forwarding Agent.

—Orange growers in Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point, for reshipment, who immediately forwarded them to their destination in another state. *Held*, that the shipment from the growers to the forwarding agent was interstate commerce, not subject to the control of the Florida Railway Commission. Cutting *v.* Florida R. & N. Co., 46 Fed. Rep. 641.

Interstate Commerce—Seizure of Intoxicating Liquor While in Transit.—Where it appeared that, at the time of seizure upon a warrant, a package of intoxicating liquors was in the possession of a common carrier, and in transit from another state to this state, for delivery here, *held*, that it was commerce "among the several states," and as such was under the exclusive jurisdiction of congress. *Held, also*, that, the package not having been broken nor delivered to the consignee, the state process for its seizure, while in that condition, was void. Such common carrier has a special title, which gives it a legal right to the custody of the property, before delivery to the consignee, as against one having no right. State *v.* Intoxicating Liquors, (Boston & Maine R. Co. Intervenor), 83 Me. 158.

Same—Inspection of Grain "In Transit" to Other States—Operation of State Law.—Act. N. Dak. 1890, chap. 188, § 5, provides that it shall be the duty of every public warehouseman to receive for storage any grain, dry and in a suitable condition; that such grain in all cases be inspected and graded by duly-authorized inspectors, etc. Section 32 provides that "the charge for the inspection of grain shall be and constitute a lien on the grain so inspected and when such grain is in transit the charges shall be treated as advance charges, to be paid by the common carrier in whose possession the same is at the time of inspection." *Held*, that the words "in transit," in section 32, did not apply to interstate shipments, and that inspectors could not require common carriers to open cars containing wheat consigned to other states for inspection at state lines. Great Northern R. Co. *v.* Walsh, 47 Fed. Rep. 406.

ROWLAND

v.

NEW YORK, NEW HAVEN & HARTFORD R. CO.

(*Connecticut Supreme Court of Errors, August 5, 1891.*

Carriers—Lien for Freight—Mistake in Quoting Rates.—If the agent of a railroad company, on being asked by a shipper the rate of freight to a certain point, misunderstands the question, and quotes the rate of freight to a nearer point, and the shipper pays the charges based upon the rate given him, and after his departure the mistake is discovered but the goods are shipped to their destination, there is no contract of shipment at the rate quoted by the agent, and the company is entitled to hold the goods until it has received its reasonable charges for transporting them.

Appeal from New Haven Superior Court.
J. P. Pigott and *W. S. Pardee*, for appellant.
W. K Townseud and *G. D. Watrous*, for appellee.

TORRANCE, J. On the 14th of August, 1889, the plainti,ff

at the defendant's freight office in Waterbury, asked the freight cashier what the rate of freight was from Waterbury to Brandford, on certain described goods. At that time such rate had been fixed and established by the defendant, and published in a book and tariff sheet, which then hung in the office, for the information of shippers, and convenient for their use. The defendant's employes had no authority to give any other rates for carrying freight than those contained in this book and tariff-sheet, and had no means of knowing the rates except by consulting the book and sheet. It was no part of the duty of the freight cashier to know the rates, or to answer questions concerning them. Such duty devolved upon the way-bill clerk, who was in the same office. When the plaintiff asked said question, the freight cashier, not knowing what the rate was, turned and inquired of the way-bill clerk what the rate was. On account of the noise made by a passing train and by persons in the office, the way-bill clerk understood the inquiry to be for the rate to Milford, and in reply gave from the book and tariff-sheet the rate to Milford, namely, 13 cents per hundred weight, instead of the rate to Branford, which was 21 cents per hundred. Thereupon the freight cashier, on account of the mistake, in figuring up the amount that would be due on the plaintiff's goods to Branford, adopted the rate to Milford instead of the rate to Branford, making the amount $9.75 instead of $15.75, which was the true tariff rate. The next day the plaintiff delivered his goods to the defendant, paid the $9.75, and took a receipt therefor. He requested the freight to be sent forward immediately, and said he was going to take the train then standing in front of the freight office. Shortly after the plaintiff left, the way-bill clerk discovered the mistake. The defendant's employes then tried to find the plaintiff, to inform him of the mistake, but, learning that he had left town, and not knowing where they could communicate with him, and knowing that he desired the goods to go forward immediately, forwarded the same with instructions to the station agent at Brandford to adjust the matter, and collect the additional $6, as was usual in cases of such mistake. On the arrival of the goods at Branford the mistake was fully explained to the plaintiff, and the defendant's agent there refused to deliver the goods to the plaintiff unless the latter would either pay or agree to pay the $6. The plaintiff demanded that the property should be delivered to him then and there, and refused to pay or agree to pay the $6. The defendant's tariff rates for freight were fair and reasonable rates, and had been in force for five years prior to August, 1889. The goods have ever since remained

Facts.

in the custody of the defendant. On the 17th of March, 1890, the plantiff brought this action to recover the value of the goods. On the 29th of March, 1890, the defendant, tentered the goods to the plaintiff, free of charge, but the plaintiff refused to accept them, on the ground that the defendant by its acts had converted the property, and was liable for the full value thereof. There was no evidence that the plaintiff had suffered any injury by being deprived of the property from the time of its arrival in Branford to the time it was tendered to him. If the plaintiff had been informed, before shipping the goods, that the freight charge would be $15.75, he would have paid that sum, and shipped them as they were shipped. The case was tried to the jury, and the record shows that the above constitute all the material facts concerning which evidence was given on the trial, and that, except with reference to the value of the property, there was on the trial no conflicting evidence.

Under these circumstances, in charging the jury, the court, having called their attention to the pleadings and the issues to be decided, stated to them, in substance, that questions of fact were to be decided by the jury, and questions of law by the court; that in the present case there appeared in the evidence no conflict whatever, and no disputed question of fact for the jury to decide. The court thereupon detailed to the jury, as facts concerning which there was no conflict in the evidence, the facts above set forth, and instructed them that, assuming these to be the facts in the case, the plaintiff was not, as a matter of law, entitled to recover; that if the jury found that there occurred such a mistake and misunderstanding as to the destination of this freight when the rates were given to the plaintiff, there was, as a matter of law, no such meeting of the minds of the parties as constituted a contract by the defendant to carry the freight from Waterbury to Branford for the sum of $9.75; and that the defendant was entitled to charge a fair and reasonable sum, and that the refusal to deliver the goods until such sum was paid was not such an appropriation or conversion of the goods as entitled the plaintiff to recover.

Instructions to jury.

The errors assigned are two in number, namely in charging the jury—*First*, "that assuming these [the facts detailed in the finding] to be the facts in the case, the plaintiff was not, as matter of law, entitled to recover," and, *second*, "that the refusal of the defendant to deliver the freight at Branford until such sum was paid was not such an appropriation or conversion of the goods as entitled the plaintiff to recover." From the plead-

No contract entered into.

ings in the case, and from the facts detailed in evidence, it is apparent that one of the main questions in the case was whether the contract which was in form entered into between the plaintiff and defendant was void on account of the mistake on the part of the defendant, set up in the pleadings and shown in evidence. The court, in substance, told the jury that it was their duty to find the facts from the evidence; that as there was on the material facts in the case no conflicting evidence, the court would assume them to be proved; and that, if the jury found them to be proved, then, on such assumption, there was, as matter of law, no contract and the plaintiff was not entitled to recover. This, we think, is the fair import of the charge. It proceeds upon the assumption that the facts detailed in evidence and upon the record are true; that a mistake as to the rate for freight between Waterbury and Branford was made in the way and manner and under the circumstances set forth upon the record; and that the jury would so find. The jury were told that such a mistake prevented the formation of a contract between the plaintiff and defendant to carry the goods for $9.75. The plaintiff claims that such a mistake did not prevent the formation of such contract. The question therefore is whether, assuming the facts to be as they are detailed on the record, the court charged the jury correctly. The plaintiff applied at the freight office of the defendant for information concerning the rate of freight upon certain goods between Waterbury and Branford. He found there two employes, one called the "freight cashier," the other the "way-bill clerk." Both of them were present in the same office, attending to their appropriate duties, which were separate and distinct. The plaintiff asked the freight cashier what such rate was. The cashier did not know, nor was it his duty to know, what the rate was; he therefore turned to the way-bill clerk, and repeated to him the plaintiff's question. The way-bill clerk, by an innocent mistake, supposed the plaintiff's question to be, what is the rate from Waterbury to Milford? and solely on account of this mistake, after informing himself from the tariff-sheet and freight book, gave the rate between the two last named points. The defendant could only make the contract through its agent or agents, and the two clerks, on the assumed state of facts, were the agents through whom the plaintiff attempted to contract with the defendant. The plaintiff's question, though at first and in form addressed to the freight cashier, was in fact and finally addressed to the way-bill clerk, and by him alone it was answered. He, therefore, and not the freight cashier, in fact fixed the terms of the proposal made by the defend-

ant, as to the only point that was then of any importance to the plaintiff or defendant, namely, the rate. It was just as if the plaintiff had seen the way-bill clerk alone, and had addressed to him his question, and had been answered by mistake, and the freight cashier had figured up the amount, taken the money, and given a receipt based upon information given him by the way-bill clerk or the plaintiff. Looking, then, at the substance of the matter, rather than its form, the proposal to carry the goods for 13 cents per hundred weight was made by the way-bill clerk rather than by the freight cashier. In point of fact all the latter did was to figure up what the aggregate charge would be, based upon the statement made by the way-bill clerk, take the pay therefor, and give a receipt. Under such circumstances it is plain that the defendant understood the question to be what is the rate to Milford? and made a proposal based upon that understanding, which was in effect a proposal to carry the goods to Milford, while the plaintiff understood the proposal to be to carry the goods to Branford. No question is raised, upon the record, as to negligence on the part of the defendant or its agents in this matter, nor as to estoppel, nor as to the sufficiency or correctness of the charge, in any respect, except as stated in the reasons of appeal. On the assumed state of facts we think the minds of the parties never met on account of this fundamental error or mistake, the result being that the contract attempted to be made was not in fact made. In this view of the matter the case comes clearly within the principles laid down in the case of Hartford & N. H. R. Co. *v.* Jackson, 24 Conn. 514, and must be governed thereby. The plaintiff, in his brief, assumes that the proposal was made by the freight cashier, and not by the way-bill clerk. He says whether he dealt with one or the other was a question of fact for the jury to decide; and that the court either decided this question of fact, and held that the plaintiff dealt with the cashier, or held that it made no difference with which one he dealt. We think, as is apparent from what has already been said, that the plaintiff is wrong in his assumption that the proposal was made by the freight cashier. The facts do not warrant the assumption. It is true that whether the plaintiff dealt with one or the other was a question of fact, but the court did not decide it as a question of fact, nor, if so, is that question before us. The question before us is whether, assuming the truth of the facts disclosed by the record, the court, in the part of the charge now in question, stated correctly the law applicable thereto. We hold that it did, and that there is no error upon this point.

The remaining question is whether the court erred in charging the jury as set forth in the second reason of appeal. The goods were carried to Branford, and no claim seems to have been made on the trial below, and it is not made before us, that by so doing the defendant had expressly or impliedly agreed to carry them there for $9.75. The facts of record afford no warrant for finding the existence of such a contract, and we must assume that the jury found that there was none. The plaintiff demanded that his goods should be delivered to him at Branford, and insisted upon this. Had his supposed contract with the defendant been a valid one, he would have been entitled to such delivery without further payment. But there was no such contract. The defendant had performed a valuable service for him, and proposed to charge him a reasonable and fair rate therefor, which rate, but for an innocent mistake, he would have paid. He insisted upon retaining the benefit of the service rendered him, without paying therefor the regular and reasonable rate. That he did this under the mistaken belief that he made a special contract for such services can make no difference. The part of the charge now in question was based upon the assumption that the jury would find that there was no special contract to carry the goods for $9.75; that there was no subsequent contract, express or implied, to carry them for that price; that the goods had been taken to Branford under such circumstances as would entitle the defendant to reasonable compensation for its services; that the rate charged was reasonable; and that the plaintiff insisted upon the delivery of the goods to him at Branford. Upon such a state of facts, which we must assume the jury found to be true, the charge of the court was correct. There is no error apparent upon the record. The other judges concurred.

Defendant entitled to lien for its reasonable charges.

LYONS

v.

HOFFNUNG *et al.*

(*Privy Council, L. R. 15 Appeal Cases, 391.*)

Stoppage in Transitu—Right of Vendor—Duration of Transitus.—Where goods are intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier, to be carried to a destination contemplated at the time of purchase by both parties. *Held*, that, whether or not delivery has been made to the carrier in such sense as to pass the property to the purchaser as owner, the goods, though held by

the carrier as the purchaser's agent, are *in transitu* till the destination is reached; and that the vendors have the right to stop them.

APPEAL from the Supreme Court of New South Wales.

Appeal from an order of the supreme court (Windeyer and Foster, J. J., Innes, J., dissenting), setting aside a verdict in favor of the appellant, and granting a new trial.

The action was brought by the appellant as official assignee of an insolvent named William Clare, carrying on business at Sydney, against the respondents, also carrying on business there, practically for the conversion of goods sold by them to the insolvent Clare upon credit, which goods they had stopped, as they contended, *in transitu*, between the port of Sydney and the port of Kimberley in Western Australia. The goods at the time of such stoppage were on board the S.S. *Gambier*, destined for Kimberley. Such stoppage was effected by the respondents because of Clare's insolvency coming to their knowledge after the goods left Sydney and before their arrival at Kimberley, and was obtained by their indemnifying Messrs. Wm. Howard Smith & Sons, Limited, the owners or charterers of the said steamer, the respondents being unpaid vendors of the goods. The respondents upon such indemnity obtained delivery up to them of the said goods.

The facts are stated in the judgement of their lordships The judgments of the supreme court are reported in 9 L. R N. S. W. p. 313. Those of the majority proceeded on the ground that the verdict was against evidence and against the weight of evidence, and that the learned chief justice had misdirected the jury in telling them that "if Clare handed up to Howard Smith & Co. the bills of lading or shipping receipts received by him (Clare) from the respondents, and received from Howard Smith & Co. another bill of lading, it was of no moment whether the latter bill of lading contained the names of the respondents as shippers, because if at that time Howard Smith & Co. entered into a contract with Clare to carry these goods and were paid freight, there would then be a fresh contract with Clare under which Howard Smith & Co. became Clare's agents, and it would be equivalent to a delivery to Clare."

Barnes, Q. C., and *P. Howard Smith*, for the appellant.

Finlay, Q. C., and *Pollard*, for the respondents.

LORD HERSCHELL.—The question raised in this action is whether the respondents, who are merchants carrying on business in Sydney, were entitled to stop *in transitu* certain goods which were purchased of them by William Clare, the trustee under whose insolvency is the

Facts.

appellant on the present appeal, and was the plaintiff in the action below. At the trial evidence was given by William Clare that when he purchased the goods he gave instructions to Davis, who was acting on behalf of the vendors, to mark the packages $\frac{W.C.}{K}$, that is, William Clare, Kimberley, and that he told him to send the goods, when packed and marked, down to Howard Smith & Co.'s wharf in Sydney. He stated that he gave no other instructions; but on cross-examination he admitted that he had told Marks that the goods were going to Kimberley; that he was going to take the goods there; that they were going with him. The evidence given by Marks was, that a day or two before the purchase he saw Clare, who told him that he was going to Kimberley; that he wanted the goods he was purchasing to be shipped by the first boat, which was the *Gambier*; and evidence was also given by Davis that at the date of the purchase Clare had stated that he was undecided whether the goods were to go by the *Gambier* or some other vessel, but that that he would let them know; and that he came two days later and told them the goods were to be shipped by the *Gambier* to Kimberley.

Messrs. Howard Smith & Co., to whose wharf the goods were to be sent, are shipowners, and were known to both parties to be then loading vessels for the port of Kimberley, the earliest of their vessels to sail being the *Gambier*. The goods were sent by the respondents to Howard Smith & Co.'s wharf, and a document was sent with them which was initialed on behalf of Howard Smith & Co. by one of their employes, which was in these terms: "Wm. Howard Smith & Sons, Limited, Sydney, 20 | 5 | 86. Steamer *Gambier*. For King's Sound. Shipper, S. Hoffnung & Co. Consignee, W. Clare. Goods, Kimberley." It appears that in respect of some of the goods, those apparently that were in bond, a more elaborate form of receipt was given by the shipowners; but in those receipts also Hoffnung & Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley.

At the trial before the chief justice several questions were put to the jury. The first three were in these terms: (1) "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf, and did the defendants accept such instructions?—Yes. (2) If so, did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?—Yes. (3) Did Clare instruct the defendants to ship the goods by the S.S. *Gambier*, and consign them to him at Kimberley?—No." The fourth is immaterial, and it was not answered by the

jury. The fifth was in these terms: "After the goods were in fact delivered at Howard Smith & Co.'s wharf, was any contract entered into between Clare and Howard Smith & Co. to ship the goods to Kimberley on his account?—Yes."

Upon those findings the chief justice entered the verdict for the plaintiff. A rule was afterwards obtained to set aside that verdict and for a new trial, on the ground that the findings of the jury were against the weight of evidence, and also on the ground that the learned chief justice had misdirected the jury on a point to which their lordships will call attention hereafter. That rule came on for argument before three learned judges in the supreme court and was made absolute for a new trial by a majority of those judges.

The first question their lordships have to consider is whether the verdict can, as the appellant alleges, be supported as being right upon a true view of the facts proved at the trial, or at least as being one which might reasonably be found by the jury. The first two questions put to the jury appear to their lordships to be possibly open to the charge of ambiguity. If the meaning of the language used, "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf and "Did the defendants in fact deliver the goods at Howard Smith & Co.'s wharf in accordance with such instructions?" be,—Were the instructions to deliver them to Clare personally at Howard Smith & Co.'s wharf and were those instructions obeyed?—it is obviously impossible to support the finding. But even if the meaning be—Were the defendants to deliver the goods to Clare at Howard Smith & Co.'s wharf in this sense, that they were to be held by Howard Smith & Co. for Clare, not as carriers, but as his agent in some other capacity?—the verdict appears to their lordships to be entirely against the weight of evidence, or indeed to have no evidence at all to support it. If all that was meant be—Were the goods to be delivered to Clare, at Howard Smith & Co.'s wharf, in this sense, that the transaction of sale and delivery was to be then completed, so that the property should pass to Clare, and he should become the owner of the goods?—the finding would be perfectly correct, but wholly immaterial upon the question whether the respondents had a right to stop the goods *in transitu*.

Questions to jury.

Reliance was placed by the appellant on the fact that the receipts which have been mentioned were handed over by the respondents to Clare, and that, being in possession of these

receipts, he obtained from Howard Smith & Co. a bill of lading. He stated that in that bill of lading he was named as consignee, but that the name of Hoffnung & Co. did not appear as shippers. Their lordships think that some doubt may well be entertained whether he is accurate in that statement, having regard to the evidence as to the course of business, and indeed applying common knowledge as to the course which such a transaction would ordinarily take. But, however that may be, and assuming it to be the fact that he did obtain such a bill of lading, in their Lordships' opinion the circumstance is wholly immaterial. The goods were undoubtedly carried by the vessel *Gambier* on a voyage to Kimberley, and were in transit upon that voyage at the time when, owing to the insolvency of Clare, the respondent stopped them. The arrangement for the freight at which the goods were carried appears to have been made in contemplation of this and other purchases by Clare before the date when those purchases were effected. The shipowners undertook, in consideration of the fact that he was about to have a considerable quantity of goods shipped, to carry them somewhat below the ordinary freight. As far as the evidence goes, no transaction with regard to the carriage of these goods took place between Clare and the shipowners after the date of the purchase; except the exchange of the receipts which have been mentioned for the bill of lading. Even assuming that the jury were entitled to disregard all the oral evidence in the case except that given by Clare, and to act upon that evidence alone, in the opinion of their lordships the decision ought to have been in favor of the defendants in the action.

Existence of right to stop goods in transitu.

It appears to their Lordships that, upon the undisputed facts of the case, the right to stop in transitu under the circumstances proved at the trial was clear. The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale; because, although the language used by Clare according to his evidence was that he was going to Kimberly, and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men; and it is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped and by

which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him.

These circumstances appear to their Lordships sufficient to indicate that the right to stop in transitu existed. The test laid down by Lord Ellenborough in the case of Dixon and Others *v.* Baldwin and Another (5 East, 175) appears clearly to cover such a case as this. Alluding to the case of Hunter *v.* Beal (cited in Ellis *v.* Hunt, 3 T. R. 467), in which it was said that "the goods must come to the *corporal touch of the vendees*, in order to oust the right of stopping in transitu," Lord Ellenborough says that this was "a *figurative* expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal as contradistinguished from a delivery to a person virtually acting as a carrier or a means of conveyance to or on the account of the principal in a mere course of transit towards him." Their Lordships think it cannot be doubted that in the present case, putting the case most favorably for the appellant, the goods came into the hands of Howard Smith & Co. as carriers on Clare's account.

Authorities reviewed.

The law appears to their Lordships to be very clearly and accurately laid down by the Master of the Rolls in the case of Bethell *v.* Clark (20 Q. B. D. 615). He says: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu and may be stopped." The present case appears to fall distinctly within the terms there employed. The goods had not been delivered either to Clare or to any agent of his to hold for him otherwise than as a carrier, but were still in the hands of the carrier as such and for the purposes of the transit. There does not seem to be any pretense for the allegation that Howard Smith & Co. were ever intended to receive or hold, or ever did receive or hold these goods except as carriers, to convey them to their destination, Kimberley. No arrangement other than an arrangement with reference to the terms of freight had been made by Clare, before the goods were put into the posses-

Goods were in hands of carrier.

sion of Howard Smith & Co. They were received by Howard Smith & Co. upon the terms—for they signed receipt notes to that effect—that they should be carried by them to Kimberley by means of a particular vessel. Those receipts, showing the terms upon which the goods had been received, passed into the hands of Clare, and were acted upon by him without the slightest objection to their form. After he had obtained possession of the receipt notes all that he did was to exchange them for a bill of lading, in order that they might, under that bill of lading, be carried to Kimberley, their destination. There does not therefore seem to be throughout the whole transaction the slightest evidence that Howard Smith & Co. ever held or were intended to hold these goods otherwise than as carriers, to be taken by them to their destination.

Under these circumstances it seems difficult to understand the contention that the right of stoppage in transitu did not exist. The learned chief justice, in summing up to the jury, appears to have told them that if Clare made a new contract with Howard Smith & Co. in respect to the carriage of these goods after they came into their possession, that would be sufficient to constitute a delivery to Clare, which would put an end to any right to stop in transitu. Their Lordships gather this from the particular direction complained of, and which formed one of the grounds on which the rule was granted. The ground was: "That his Honour, it is submitted, erroneously told the jury that if Clare handed up to Howard Smith & Sons, Limited, the bills of lading, or shipping receipts, received by him from the defendants, and received from Howard Smith & Sons, Limited, another bill of lading, it was of no moment whether the latter bill of lading contained the names of the defendants as shippers, because if at that time they entered into a contract with Clare to carry these goods, and were paid freight, then there would be a fresh contract with Clare, under which Howard Smith & Sons, Limited, became Clare's agents, and it would be equivalent to a delivery to Clare." No doubt it might be equivalent to a delivery to Clare for the purpose of passing the property to Clare; but if his Honor intended to instruct the jury that such a contract entered into between Clare and the shipowners would be equivalent to the shipowners holding the goods for Clare otherwise than as carriers, and becoming his agents so as to create a new transaction, having its initiation only at that time, their Lordships are unable to agree with the law which appears to have been laid down. If the goods were received by Howard Smith & Co. to be carried to Kimberley, and this was indicated as the des-

tination of the goods at the time when the vendors were instructed to deliver the goods to the carriers, then, in the view which their Lordships take, it is immaterial whether a fresh bill of lading was obtained by Clare, or whether that bill of lading contained the name of Clare or of the defendants as shippers.

The appellant relied upon several cases which were pressed by the learned counsel on their Lordships, in which it had been held that although the vendor knew that some foreign destination was intended for the goods, yet if he delivered them to a shipping agent to be by him sent abroad, the transit, so far as the vendor was concerned, then came to an end, and that there was no right in the vendor to stop on the subsequent voyage. Their Lordships do not think that those cases are in any way applicable to the circumstances existing here. There the delivery was not a delivery by the vendor to the carrier to be carried to a destination indicated at the time of sale. A new transit commenced which had its origin in the action of the shipping or forwarding agent, as the case might be, which appears to be an altogether different case from that with which their Lordships have to deal; where the goods passed direct from the hands of the vendors into the hands of the carriers, to be carried to the destination then contemplated by both parties.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from be affirmed. The appellant must pay the costs of the appeal.

Stoppage in Transitu.—*Transfer of Bill of Lading by Insolvent Consignee.*—In Missouri Pacific R. Co. *v.* Heidenheimer (Tex. November 10, 1891), 17 S. W. Rep., 608, the action was brought against the defendant company to recover the value of goods received by it as a common carrier and not delivered. It appeared that the bill of lading for the goods in question was sent by the consignor to the consignees, and by them transferred to the plaintiff. *Held*, that this defeated the consignees' right of stoppage *in transitu*. The Court said: "A bill of lading is regarded as a quasi-negotiable instrument. It symbolizes the property which it describes. The assignment of a bill of lading, indorsed thereon, accompanied by delivery of the instrument, passes to the assignee title to the goods, though actually in transit, as complete as if they had passed through the buyer's hands, and been delivered bodily to the assignee. When, by such an assignment, the consignee transfers it for value to a third party, acquiring it in good faith, the right of stoppage *in transitu* is defeated. Daniel, Neg. Inst. (3 Ed.), §§ 1727–1730; 23 Am. & Eng. R. Cas., 703, note, "Stoppage in Transitu;" 2 Am. & Eng. Enc. Law, 242–244. It is held also by some authorities that, where a bill is so assigned as collateral security, the rights of the pledgee thereunder are the same as those of an actual purchaser of the goods for value, so far as the exercise of those rights is necessary for the holder's protection; and that one who makes a temporary advance to the vendee, taking the bill as his security, has the same rights as the buyer of the goods. 2 Am. & Eng. Enc. Law, 243, 244, and note 4;

1 Wait, Act. & Def., pp. 528, 529, § 11; Campbell *v.* Alford, 57 Tex., 162; Adoue *v.* Seeligson, 54 Tex., 594. In any event, it must, we think, be conceded that, if the transfer of a bill of lading by way of pledge or mortgage, or as collateral security for a loan, do not absolutely defeat the right of stoppage *in transitu*, the seller cannot exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee. Chandler *v.* Fulton, 10 Tex., 24; 1 Wait, Act. & Def., p. 529, § 13."

Rights Acquired at Mortgage Sale.—At the time of the delivery of the goods shipped to a merchant on his written order, his store and stock were in the possession of an agent who represented several mortgagees, whose mortgages were given after the goods were ordered, and under one of which a sale was made at about the date of such delivery, and the goods bid in by one of the mortgagees, who remained in possession, and from whom, and the merchant who was acting as agent for the mortgagee, a portion of the goods ordered were replevied by the vendor, who claimed the right to stop them in transit. And it is held that if the merchant was insolvent when he made the order, or became so at any time before he claimed the delivery of the goods, and if they were never actually delivered to his possession, the vendor's rights were paramount to any acquired at the mortgage sale; which question of actual delivery was for the jury. Kingman & Co., *v.* Denison, 84 Mich., 608.

Vendee Obtaining Possession of Property by Fraud and Selling It Again.—One who ships property on a contract of sale to commission merchants to be delivered to the shipper on payment of a draft, which he forwards with a bill of lading, has a right to stop it *in transitu*, after it has been obtained by the purchaser by fraudulent means without payment and sold by him to an agent who has shipped such property to his principal. Bergeman *v.* Indianapolis & St. L. R. Co., 104 Mo., 77.

RANDALL

v.

RICHMOND & DANVILLE R. CO.

(*108 North Carolina 612.*)

Carriers—Prepayment of Freight—Connecting Lines—A common carrier may require prepayment of freight charges from any shipper at its choice, although it does not require it from others, and may lawfully refuse to receive freight from a connecting carrier without such prepayment. It should appear however, that the shipper or forwarding carrier had notice that prepayment was required.

Appeal from Madison Superior Court.

Action by J. W. Randall against the Richmond & Danville Railroad Company for refusal to receive freight.

F. H Busbee, for appellee.

CLARK, J.—A common carrier can demand prepayment of freight from any one and to any station. Code, § 1963; Allen *v.* Cape Fear & G. V. Co. 100 N. Car 397, 35 Am. &

Eng. R. Cas. 532. That the defendant made a general regulation that it would require prepayment on all freight to a flag station (at which there was no agent) was not only reasonable, but was a matter entirely within the defendant's powers. A common carrier may require prepayment from any shipper at its choice, though it may not require it from others. Allen *v.* Cape Fear & G. V. Co., *supra.* It should appear, however, that the plaintiff or his forwarding agent, the first company, had notice that prepayment was required. This the defendant was not improperly allowed to do by showing as it did, that all freight to this station was required to be prepaid, and, further, by the plaintiff himself that he knew of such regulation. It was also in evidence that notice was given to the East Tennessee, Virginia & Georgia Railroad, who were the agents of plaintiff for forwarding the freight beyond its own line. A witness introduced for defendant testified that the defendant did not accept the freight from the East Tennessee, Virginia & Georgia Railroad till February 28th, and that it was shipped the next day. The two companies were not shown to be under the same management, but were simply connecting roads. The defendant was not required to receive freight from the East Tennessee, Virginia & Georgia Railroad for shipment without prepayment of freight, any more than from any one else. It is in evidence, and not contradicted, that the defendant notified such company that it required prepayment, and, when it was satisfied in that regard, that it immediately received and promptly shipped the freight. If the East Tennessee, Virginia & Georgia Railroad received prepayment of freight for shipment over both lines, and negligently failed to prepay the defendant, as required by its regulations, and the plaintiff has suffered damage by the consequent detention, he must look to the company who received his money, and with whom he contracted for the shipment. Mount Pleasant Manufacturing Co. *v.* Cape Fear, etc. R. Co., 106 N. C. 207. The court properly instructed the jury that there was no evidence that the defendant received the freight until February 28th, and to find the issues in favor of the defendant.

Carrier may require prepayment.

No error.

Carrier may Demand Prepayment of Freight—A carrier may require a prepayment of his charges and may refuse to carry goods tendered for transportation unless such charges are paid in advance. "While the law compels him, from motives of public policy, to deal with all persons, and leaves him no choice as to his customers, it does not bind him to deal on credit, and he may demand the price of his labor before it is performed.

Hutchinson on Carriers, § 116; Pickford *v.* Grand Junction R. Co. 10 M. & W. 372; Barnes *v.* Marshall, L. R. 18 Q. B. 785; Wyld *v.* Pickford 18 M. & W. 448; Botson *v.* Donovan 4 B. & Ald. 28; Bastard *v.* Bastard, 2 Shower 81; Allen *v.* Cape Fear & Y.V.R. Co., 100 N. Car. 397, 35 Am. & Eng. R. Cas. 532. The supreme court of North Carolina in the principal case and in the case of Allen *v.* Cape Fear & Y. V. R. Co., *supra*, take the doubtful position that a carrier may discriminate among shippers in this regard, and require prepayment of some and allow credit to others. In the Allen case it is said that this right to demand prepayment is but the exercise of a right to demand of every one, that, upon all freight conveyed, the charges must be paid in advance; and we do not perceive any legal wrong done to one to whom credit may not be given because it is given to others, it may be because of their punctuality in paying bills whenever they are presented. The statute recognizes the right, for it compels the company to furnish transportation, not generally, but 'on the due payment of the freight or fare legally authorized therefor' (Code § 1963); and therefore the exaction of prepayment of freight for goods consigned to the plaintiff is but the assertion of a right which might be, if in fact it be not, enforced against all dealers."

HAZEL

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(*Iowa Supreme Court, May 20, 1891.*)

Carriers—Limitation of Liability—Conflict of Laws.—A contract limiting the liability of a carrier, valid in the state where it was made and from which the goods were shipped, will control the carrier's liability for a loss occurring in a state where such a contract is void.

Limitation of Liability by Special Contract—Dakota Code.—Under section 1261 of the Dakota Civil Code, which provides that the obligations of a common carrier may be limited by special contract, a shipper may release the carrier from all liability except for negligence, and the liability may be limited to five dollars for each hundred weight of goods.

APPEAL from Woodbury District Court.

This is an action at law to recover the value of certain household goods, which it is claimed the plaintiffs shipped over the defendant's railroad from White Lake, in Dakota, to Sioux City, in this state. It is averred in the petition that the defendant failed to deliver said goods to the plaintiffs at Sioux City, and that they were lost. The defendant denied the allegations of the petition, and claimed that the property was delivered to the plaintiffs at Sioux City, and that the plaintiffs entered into a written contract with the defendant, through its agent at White Lake, by which, in consideration of reduced freight charges, the plaintiffs agreed that in case of loss or damage while the goods were in possession of the defendant the amount to be paid by

the defendant should not exceed five dollars per hundred pounds. There was a trial by jury, which resulted in a verdict and judgment for the plaintiffs in the sum of $304. Defendant appeals.

O. J. Taylor, for appellant.

Roberts & Roberts, for appellees.

ROTHROCK, J.—The goods were shipped in the name of Mrs. G. Hazel or Mrs. George Hazel. There is a conflict in the evidence as to whether the box in question was delivered to the plaintiff at Sioux City, and whether the plaintiff George Hazel, who personally attended to the shipment, signed the name "Mrs. G. Hazel" to the alleged contract limiting the liability of the defendant as carrier of the goods. These disputed facts demand no further consideration than to say that they were for the jury to determine, and we find no reason for disturbing the verdict, so far as these questions are involved. Case stated.

The only real question in the case arises upon the construction of the legal effect of the alleged contract limiting the liability of the defendant as a common carrier. It is not disputed that the box of goods in question was transported from White Lake to Sioux City, and that, if it was lost, the loss occurred after the property was brought into this state; and no question is made as to whether the defendant is liable as a common carrier or as the keeper of a warehouse. The learned district judge was of the opinion that, while the contract limiting the liability might be valid in Dakota, yet, as the contract of shipment was to be partly performed in this state, the contract limiting liability is contrary to section 1308 of the Code, which in effect declares such contracts to be void, and that the courts of this state will not give extra territorial effect to such an act of a sister state. The offer to introduce said contract in evidence was overruled, and it was ignored in the instructions to the jury. It was held in McDaniel *v.* Chicago & N. W. R. Co., 24 Iowa, 412, that where a railway company undertook to transport a certain lot of cattle from Clinton, in this state, and deliver them in Chicago, the contract, being entire and partly to be performed in this state, must be governed by our law as to its validity and interpretation, and that a restriction as to liability by the company, although valid under the law of Illinois, was invalid in this state, and the carrier was liable the same as if no such stipulation had been inserted therein. In Talbott *v.* Merchant's Despatch Transportation Co., 41 Iowa, 247, a contract for the transportation of certain goods from Hartford, Conn., to Des Moines, in this state, contained exemptions from liability for Validity of contract limiting liability.

loss by fire. The goods were destroyed by fire while in transit at Chicago, Ill. It was held that, as the exceptions were valid in the state where the contract was made, and valid in the state of Illinois, where the loss occurred, the contract was valid, and there could be no recovery for the loss. The question as to the validity of the contract if the loss had occurred in this state was not determined. Applying the rule of the case last cited, if the goods in controversy had been lost while in the possession of the defendant in Dakota the liability would be limited as provided in the contract.

It is claimed by counsel for appellees that the contract is void even under the laws then in force in the territory of Dakota. Dakota was a territory at the time the shipment of the goods was made. The answer of the defendant sets forth the following as the law of the territory at that time in force: "Sec. 1261. The obligations of a common carrier cannot be limited by general notice, but may be limited by special contract." "Sec. 1263. A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery, therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instruments can only be manifested by his signature to the same." It is claimed in behalf of the plaintiffs that the contract restricting the liability of the defendant is not authorized by the above provisions of the law of Dakota. This position is not well taken. The statute expressly authorized the making of a special contract, limiting the obligations of a common carrier. The contract in question limits the liability to five dollars per hundred pounds, and the liability is to attach only for loss which occurs by the gross negligence of the defendant. It is claimed that under the rule announced in Hartwell *v.* Northern Pacific Express Co., 5 Dak. 463, 37 Am. & Eng. R. Cas. 635, the statute in question is held not to be different from the common law; but this is a mistake. All that is determined in that case is that under the sections of the statute above cited a condition in a bill of lading that the carrier would not be liable for any loss or damage unless claim was made therefor within a certain time was not binding upon the shipper, because the contract restricting the time of bringing suit was not signed by him. In the case at bar the contract purported to be signed by the shipper, and there was a strong conflict in the evidence as to whether the signature was genuine. There is therefore no other ground

Contract valid under laws of Dakota.

upon which the exclusion of the contract from the consideration of the jury can be sustained, except that upon which it was placed by the district court. In our opinion it cannot be upheld on that ground. It is a fundamental rule, and one of almost universal application, that in case of a conflict of laws concerning a private contract the law of the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract, unless it is shown by the contract, or fairly inferable therefrom, that the parties intended that the law of another state or county should control their rights. In this case the parties contracted under the laws of Dakota, and the fact that such a contract is void in this state shows that it was intended that our law should not have any application to their contract. The question as to the validity of such contracts where part performance is contemplated in a state or county where the law, statute, or the decisions of the court are in conflict with the law of the place where the contract was made, has recently been exhaustively examined and discussed by the supreme court of the United States in the case of Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S. 458, 37 Am. & Eng. R. Cas. 699. After a thorough consideration of adjudged cases the court announces its conclusion in the following language: "This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it was made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country." We need not cite other cases in support of the rule above announced. Many of them will be found in 2 Am. & Eng. Enc. Law, page 834. A number of these cases are plainly in point on the question under consideration. See, also, Hutch. Carr. page 108. Further elaboration or discussion appears to us to be unnecessary. Our conclusion is that the court should have submitted the contract in question to the jury, with instructions that if they found that the name "Mrs. G. Hazel" was properly signed by George Hazel the plaintiffs were bound thereby.

Reversed.

Validity of Stipulation limiting Carrier's Liability Determined According to Lex Loci.—It is the general rule that when a contract of carriage is to be performed in several states, the *lex loci contractus* determines the validity of clauses for the exemption from liability for loss or damage. Ryan *v.* Missouri, K. & T. R. Co. (Tex.) 23 Am. & Eng. R. Cas. 703. Thus, a railroad contract limiting the liability of the carrier for transportation of goods into Georgia from another state, has been held to be valid by the courts of Georgia, if it was valid where it was made, although it would be void if made in Georgia. Western & A. R. Co. *v.* Exposition Cotton Mills (Ga.) 35 Am. & Eng. R. Cas. 602. In Pennsylvania it has been held that a contract for the carriage of goods, which contains a stipulation releasing the carrier from liability for damages for his negligence, will be enforced in that state according to the law of New York, where such a stipulation was valid, where the contract was made, was to be performed, and the alleged breach occurred, in New York. Forepaugh *v.* Delaware, L. & W. R. Co. (Pa.) 40 Am. & Eng. R. Cas. 78. However, it has been said by the United States supreme court that a stipulation in a bill of lading made at a port of the United States, by which a carrier attempts to exempt itself from liability for the negligence of its servants, will be held invalid, notwithstanding the fact that its validity is recognized by the *lex loci contractus*. Liverpool & G. W. Steam Co. *v.* Phœnix Insurance Co. (U. S.) 37 Am. & Eng. R. Cas. 681. In the latter case the court said: "It was argued for the appellant that the law of New York, the *lex loci contractus*, was settled by recent decisions of the court of appeals of that state in favor of the right of a carrier of goods or passengers by land or water, to stipulate for exemption from all liability for his own negligence. Mynard *v.* Syracuse, B. & N. Y. R. Co., 71 N. Y. 180; Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71. But on this subject, as on any question depending on mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by the decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 368; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; Carpenter *v.* Providence Wash. Ins. Co., 16 Pet. (U. S.) 495, 511; Swift *v.* Tyson, *Id.* 1; Brooklyn, C. & N. R. Co., *v.* National Bank, 102 U. S. 14; Burgess *v.* Selegman, 107 U. S. 20, 33, 1 Am. & Eng. Corp. Cas. 542. Smith *v.* Alabama, 124 U. S. 465, 478; 33 Am. & Eng. R. Cas. 425. Bucher *v.* Cheshire R. Co., 125 U. S. 555, 583, 34 Am. & Eng. R. Cas. 389. The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution of the United States.

Limitation of Liability—Agreed Valuation—Loss owing to Negligence.—In Texas it is held that a stipulation, limiting the liability of a common carrier for the loss of goods delivered to it for transportation, is void, where it does not provide for full payment in case the loss is due to its negligence. Galveston, H. & S. A. R. Co. *v.* Ball (Tex., April 28, 1891) 16 S.W. Rep. 441.

Same—Validity of Stipulation that Employes Assisting Shipper to Unload shall be his Servants.—A railroad company cannot limit its liability as a common carrier for the negligence of its employes, by stipulating in the contract of shipment that when the carrier furnishes the shipper with laborers to assist in loading and unloading his goods, they shall be deemed the shipper's servants while so engaged, and that the company shall not be responsible for their acts. Missouri Pacific R. Co. *v.* Smith (Tex., May 19, 1891) 16 S. W. Rep. 803.

PEORIA & PEKIN UNION STOCK R. CO.

v.

UNITED STATES ROLLING STOCK CO.

(*Illinois Supreme Court, March 30, 1891.*)

Carriers—Transportation of Cars—Loss by Fire.—A railroad company is not liable for the loss by fire of a car received by it to be transported to a storage yard on its road after it has been unloaded on a side track at the same place, while such car is standing on the side track at the place of its destination to be unloaded.

Termination of Carrier's Liability Before Loss—Burden of Proof.—Where, by the contract of carriaeg, a railroad company is bound, when a car, which it has agreed to transport, is unloaded, to transport it to another place, the burden of showing that the liability of the company, as a carrier of such car, has again attached after it has made the first delivery, is thrown upon the opposing party.

Assumpsit by the United States Rolling Stock Company against the Peoria & Pekin Union Railway Co. for certain cars which had been delivered to defendant for transportation, and which had been burned. Plaintiff obtained judgment, which was affirmed by the appellate court.

Stevens & Horton, for appellant.

H. W. Wells, for appellee.

SHOPE, J.—It is stated by counsel for appellee: "The only question in the case is, was appellant liable as a common carrier of the cars, and was its liability as to the cars terminated before the cars reached destination, that is, the storage yard? In other words, did the stoppage to unload freight complete the transportation of the cars which were destined for another point?" Other points are made by appellant as to the right of appellee to recover, which, in the view we take of the case, will be unnecessary to discuss or determine. No negligence is charged, and the only question is, was appellant liable as a common carrier of the cars at the time of their destruction? In Peoria & P. U. R. Co. *v.* Chicago, R. I. & P. R. Co., 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, we held that a railroad company receiving cars from a connecting line of road for transportation over its line became, in the absence of a special contract, a common carriers of the cars as well as of the freight therein. We are of opinion that the doctrine there announced is sustained both by reason and authority. Mallory *v.* Tioga R. Co., 39 Barb.

Question presented:

Railroad as a carrier of cars.

(N. Y.), 488; East St. Louis Connecting R. Co. *v.* Wabash. St. L. & P. R. Co., 123 Ill. 594, 32 Am. & Eng. R. Cas. 522; Missouri Pac. R. Co. *v.* Chicago & A. R. Co., 25 Fed. Rep. 317, 23 Am. & Eng. R. Cas. 718.

The facts conceded establish that the cars in question were taken by appellant, by the order and direction of the person who had authority to control the same, from the side track of appellant's road, where they had been left by the transporting company, and were by it delivered upon appellant's tracks to the sugar refinery, the consignee of the freight contained in the cars, to be by the consignee unloaded, when it would become the duty of the appellant to transport the car to its storage yard, where ordinarily they could remain until needed in the course of business. It is also conceded that the appellant company had no duty in respect of the unloading of the cars, and no control in fixing the time they should remain at the industry for that purpose. It appears, however, that the sugar refinery was "slow" in unloading consignments to it, and the record is wholly silent as to whether the cars had or had not been unloaded when they were burned. The point is sharply made by counsel upon the refusal of the court to hold the fourth proposition submitted by the defendant, as to the burden of proof as to whether the cars had been unloaded at the time of the fire. By that proposition the court was asked to hold, in substance, that if the cars just previous to the destruction had been delivered to the defendant (appellant) by the receiver of the transporting line, to switch to the Peoria Sugar Refinery to be unloaded, and thence, when unloaded, to the storage yard of the defendant, (appellant,) and defendant did switch the cars to the Peoria Sugar Refinery to be unloaded as it was directed, and the defendant had nothing to do with the unloading, but that it was to be done by the refinery, and when destroyed the cars were on such track where defendant was directed to place them by the receiver or his agent, if proved, and had not been unloaded, of which issue the burden of proof is on the plaintiff, then plaintiff cannot recover, etc. The court struck out the words, "of which issue the burden of proof is on the plaintiff," and added to the proposition the following: "And the burden of proof is on the plaintiff to make out its cause of action, but, the relation of common carrier being once shown, the burden is shifted to the defendant to show that at the time of the loss its liability as such had terminated."

Facts.

It is manifest that, in determining the question thus raised, it will be necessary to consider the proposition of counsel before quoted; that is, whether the stoppage to discharge the

car of its freight and over which appellant had no control, changed the liability of appellant during such stoppage, although the car after being unloaded by the consignee of the freight, was to be again taken by the appellant to its yards for storage, it is insisted that Peoria & P. U. R. Co. *v.* Chicago, R. I. & P. R. Co., *supra*, has determined this question favorably to appellee, and it must be conceded to be so, unless that case is distinguishable from the one at bar. It is stated in the opinion of the court in that case that the Chicago, Rock Island and Pacific Railway Company placed upon the transfer track of appellant company a car to be transferred by the latter over its switch track to the Monarch Distillery, consignee, of the contents of the car. The car was taken by appellant company, delivered to the consignee on appellant's tracks, and unloaded, and was afterwards taken by appellant, without the knowledge or consent of the Chicago, Rock Island & Pacific Railway Company, to another industry, to be there reloaded, and at which it was destroyed by fire. From the statement thus made it appears that, at the time of the destruction of the car, it had been retaken by the appellant company from the Monarch Distillery, and transported elsewhere to be loaded, without authority of the owner company. It is stated that there was evidence tending to show an understanding among the connecting railroads doing business with appellant, if other shippers desired cars appellant, without any specific order to that effect, was at liberty to place them in position to be loaded, and then return them to the company owning the cars to be shipped, and that such cars were delivered by appellant under the order of the industry at which they were burned; yet that fact seems not to have affected the determination of the cause, and the case was made to turn upon the fact that the defendant had exclusive control of the car while on its tracks and was under obligation to return the same to the owner company when unloaded by the consignee. If the car had been destroyed at the distillery, while there to be unloaded by the consignee of the goods therein, it seems to us that a different question would have arisen; but the defendant assumed control of the car after its freight was discharged, and, instead of returning it to the owner, took it elsewhere, where it was destroyed. It was held in that case that the Chicago, Rock Island & Pacific Railway Company, having parted with the care and control of the car, and having intrusted it to the defendant, could not, at any point on its road, interfere for its safety, and that the duty attached to appellant to return the car to the owner and it was there-

Effect of stopping car to be unloaded.

fore liable as a common carrier. There was no duty to return the car until delivered at the distillery, and the freight had been unloaded; but such liability arose, if at all, upon appellant's again assuming control of the car to remove it from the distillery. In the case at bar appellant received from the transporting line, appellee's lessee, in the regular course of its business, the cars in question, to be transported over its tracks to the sugar refinery, there to be left standing on appellant's tracks, at the refinery, until unloaded by the consignee of the contents of the car. Having nothing to do with the unloading, and having delivered the cars on the track at the refinery, its whole duty as common carrier of the freight contained in the cars was at an end. The transit of the goods had terminated, and the cars on the track were so far delivered into the control of the refinery as to enable it to discharge the freight. It is not questioned that there was complete delivery of the cars and contents to the refinery in proper time and manner, and at the proper place, for the purposes contemplated; that is, that the refinery company might unload the freight. Appellant had no control of the time such cars should remain at the refinery for such purpose; that, it would seem from the course of business, was in the discretion of the consignee of the freight. While transporting the cars, and in complete, uninterrupted control of them, appellant was liable as a common carrier for injury to these cars, not caused by the act of God or the public enemy. Mallory *v.* Tioga R. Co., *supra*; Vermont & M. R. Co. *v.* Fitchburg R. Co., 14 Allen, (Mass.), 462; Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 16 Am. & Eng. R. Cas. 57; Missouri Pac. R. Co. *v.* Chicago & A. R. Co., *supra*.

By the terms of the contract of carriage, the control of the goods ceased absolutely by the delivery to the consignee on the track, and was suspended as to the cars for an indefinite period, the duration of which was to be determined, not by appellant, but by the consignee of the goods. Until the consignee of the goods had unloaded the cars, appellant had no right to remove them, take them to its storage tracks, or other place of safety, The course of business, as well as the contract of appellant with the connecting lines, contemplated that while upon switching the cars to the industries reached by appellant's tracks, the cars were to be permitted to stand upon such tracks, to suit the convenience of the consignees of the goods shipped; and while the contracting roads undoubtedly might have limited the time for the stoppage of the cars for the purpose of unloading, it does not appear that they

did so, or that any custom or usage prevailed that would fix the same, In case of Missouri Pac. R. Co. *v.* Chicago & A. Ry. Co., *supra*, 10 loaded cars were received by the one road for transportation over its lines from the other, and it was held liable for the cars as a common carrier for all injuries occurring while *en route*. But it was held that if destroyed after the carriage had terminated, and there had been a delivery, or a tender to deliver, to the consignee, there was, as to the cars, no liability as a common carrier, and, although the cars remained on the tracks of the transporting company, its liability was that of warehouseman only. In East St. Louis Connecting R. Co. *v.* Wabash, St. L. & P. R. Co., *supra*, the cars, laden with coal, had been delivered to the connecting railway company for delivery to the consignee, and were taken by the latter from the tracks of the connecting company over its private tracks to be discharged of their freight, after which they were to be redelivered to the connecting company, to be returned to the owner. While in possession of the consignee the cars were burned, and it was insisted that, because the cars were to be returned to the owner company by the connecting railway company, it was liable as common carrier of the cars. The contract of carriage not being complete until the cars were returned to the owner company, it was insisted the liability as a carrier continued. But it was held that as the cars were shoved upon the consignee's private tracks, in conformity with the previous course of business, they had reached their destination, and that consequently the liability as common carrier of them ceased. It was also there said: "Had the glucose company [consignee] unloaded and returned them, as it was the custom to do, the defendant's liability as a common carrier would have commenced anew, and continued until they were delivered to appellee." It is true in that case the cars were placed on the private tracks of consignee and taken a few hundred feet away from the connecting railway company's track to be discharged of their freight; but that cannot, in our opinion, distinguish the case from the one at bar, in principle. It was in contemplation of the parties that the car was to be taken to a point upon the railroad, and was there to be delivered to the consignee; and it cannot be important whether the car was taken a few feet off of appellant's tracks, or left standing thereon, in considering whether the liability as insurer continued. In either case the car had passed from that absolute control of appellant to which it is entitled as a common carrier; and it must be held that when the car and its contents were delivered to the consignee on the switch track of the appellant, at the industry to which

they were consigned, the car had reached its destination; and that while the car was under the control of the consignee the liability of the carrier was suspended, to again attach when the car was ready for further transportation to the storage yards of appellant. In the interim, which might be for a shorter or longer period of time, as determined by a party over whom appellant had no control, and for whose acts it was in no wise responsible, appellant although the cars were standing upon its switch tracks, would have no such control as would authorize it to take the cars elsewhere for safety, and it would be manifestly unjust, and inconsistent with the reason for applying the rule, to hold it responsible during that time as an insurer.

The trial court was correct in its holding that, "the relation of common carrier being once shown," it is presumed to continue, and the burden is on the carrier to show that at the time of the loss its liability as such had terminated. This, however, was done by showing delivery to the consignee; and if in further disposition of the car, under the contract of the parties, or in the usual course of business, the liability again attached, the burden was upon plaintiff to show it. If the cars were delivered to the consignee until unloaded, and the liability as common carrier ceased while the same were in its custody, such liability would not revive or again attach until the cars were unloaded. As we have seen, the case does not proceed upon the basis, nor is it contended, that appellant was guilty of negligence in not removing the cars after they were unloaded, or is guilty of negligence in any other respect. We are of opinion that, in view of the facts shown and admitted, the court erred in holding that the liability of appellant was that of common carrier, and that, if plaintiff intended to rely upon the duty of appellant to remove the cars to a storage yard, the burden was upon it to show that the duty had attached. The judgment of the appellate and circuit courts are reversed and cause remanded.

Burden of Proof.

Liability of Railroad Company Transporting Cars of Another Company.—See East St. Louis Connecting R. Co. *v.* Wabash, St. L. & P. R. Co. (Ill.) 32 Am. & Eng. R. Cas. 522, and cases cited in note to this case, page 524. And see also note to the case of Peoria & P. U. R. Co. *v.* Chicago, R. I. & P. R. Co. (Ill.) 18 Am. & Eng. R Cas. 511.

Failure of Carrier to Deliver Goods—Declaration of Agent that Car Was Burned.—The declaration of a depot agent of a railroad company, made in response to a consignee's inquiry for his goods, that they were burned up in a car a few nights previously, is not admissible as evidence against the company when sued for the loss of the goods. Louisville & Nashville R. Co. *v.* Carl, 91 Ala. 271.

Loss of Goods by Carrier—Recovery of Value—Conjectural Damage.—Though goods, saved by a common carrier from the perils of a freshet, were damaged by passing through the freshet, yet if some not saved are unaccounted for, and it is not shown that the freshet caused their loss, or what their condition was when they disappeared, a recovery for their value may be had against the carrier without deducting anything for conjectural damage which they may have sustained by reason of the freshet before the loss occurred. Charlotte, C. & A. R. Co. *v.* Wooten 87 Ga. 203.

Action for Lost Goods—Oral Evidence by Consignee as to Quantity and Value.—A consignee of goods carried by a railroad company, and which it was alleged were never delivered, who has not seen such goods, cannot, in an action for the value of the goods, testify as to their quantity and value as shown by the invoice without producing that paper, or accounting for its absence. Louisville & Nashville R. Co. *v.* Carl, 91 Ala. 271.

Damages for Failure to Deliver Goods—Loss of Profits.—The damages recoverable of a common carrier for breach of its contract to deliver goods include the profits which would have been made by the shipper, if the delivery had been made as agreed upon. Central R. & B. Co. *v.* Skellie, 86 Ga. 686.

GOODMAN

v.

OREGON RAILWAY & NAVIGATION CO.

(*Oregon Supreme Court, February 1, 1892.*)

Carriers—Damaged Goods—Way Bill of Connecting Line in Evidence.—Where a shipper sues to recover damages for injuries to goods alleged to have been received while in transit over defendant's railroad, and introduces in evidence a way bill of a prior connecting road, he cannot be permitted to select that part of such way bill which is favorable to his side of the case, and exclude a sentence written thereon in lead pencil, reciting that the goods, when received, were in a badly damaged condition; the simple finding of such sentence written in pencil is not enough to show that it had been surreptitiously written by some unauthorized person. If the shipper makes such way bill evidence by offering a part of it, omitting the sentence written in pencil, defendant has the right to have the entire paper submitted to the jury, and its exclusion by the court is error.

Evidence of Damage on Defendant's Line—Instruction.—In an action for damages to goods carried by a railroad company, if the allegations in the complaint that the goods were damaged while in transit over the defendant's line, are unsupported by the evidence, the defendant is entitled to an instruction to that effect.

Injuries Arising from Improper Packing.—A carrier is not liable for injury or damage to goods carried by it arising from insecure or improper packing or boxing. If the goods to be carried are susceptible to easy breakage the greater care is required of the shipper in the matter of packing to prevent injury.

Liability of Carrier Delivering Goods in Condition in Which They Were Received.—Although goods transported by a carrier are found to be in a damaged condition when delivered, the carrier is not liable if it appears that the goods were in the same condition when they were received by it.

Presumption as to Condition of Goods at Connecting Point of Two Lines—Instruction.—In an action for damages to goods carried over two connecting lines, it is error for the court to instruct the jury that the goods should not be presumed to have been in a worse condition at the point where they were received by the defendant company from the initial carrier, than at the starting point, where there is evidence to show that at a station on the connecting line between the starting point and the point where the goods were received by the defendant, the goods were in a badly damaged condition.

Appeal from Multnomah Circuit Court.

This action is founded upon two counts for damages to two lots of goods alleged to have been shipped over the defendant's line,—one lot marked "S. W. Miller," and another lot marked "H. D.;" the value of the S. W. Miller lot being charged at $1,408.29, and that of the H. D. lot as of the value of $2,125.28, the value being the alleged value at Portland, Or. The goods consisted of a variety of drugs and medicines, principally in bottles; some in barrels, consisting of oils, whiskies, etc. It was charged in the complaint that in August, 1888, plaintiff delivered to the defendant company, as a carrier, at Huntington, Or., this merchandise which it was charged the defendant received at Huntington, and agreed to safely transport to Portland, Or., and there deliver to the plaintiff within a reasonable time. The complaint then charged that the defendant did not safely carry or deliver the goods, but on the contrary, by negligence and misconduct of the defendant, "the same were in great part wholly lost and destroyed, and in great part so destroyed, damaged and injured as to be wholly worthless and of no value, and, as to the rest and remainder of the same so damaged and injured as to be rendered nearly worthless, and plaintiff was compelled to and did sell the rest and remainder for the sum of $387.70, which was and is a reasonable value therefor, on account of the said damage and injury, and that all of said merchandise marked 'S. W. Miller' was lost, or so destroyed, damaged, and injured as to be nearly worthless and of no value when the same arrived in Portland, Or., and, on account of the worthlessness of the same, plaintiff refused to receive the S. W. Miller goods on arrival at Portland, Or." The material allegations of the complaint were denied by the answer.

The evidence at the trial tended to show that in July, 1888, the plaintiff shipped from Kahoka Mo., over the Keokuk and Western Railway, two separate lots of goods, by separate shipments, and with separate bills of lading therefor, of the general nature and character of goods in the complaint mentioned; one lot being billed to Hugh Doak, at Granger,

Wyo., for delivery there, and another lot billed to S. W. Miller, at Ogden, Utah, for delivery there. The evidence tended to prove that the goods were carried by rail by different railway companies from Kahoka, Mo., and finally reached their respective destinations at Granger and Ogden, respectively; that, in the course of this carriage, they were carried from Kansas City, Mo., to destination by the Union Pacific Railway Company. The evidence of the plaintiff further tended to show that he had followed the goods, and had seen them boxed in the warehouses at Ogden and at Granger, Wyo. The bills of lading which he received from the Keokuk & Western Railway Company were as follows: "Received from Dr. Lee Goodman the following described packages in apparent good order, contents and value unknown, consigned as marked and numbered on the margin, to be transported over the line of this road [the Keokuk and Western Railroad] to the company's freight station at its terminus, and delivered in like good order to the consignee or owner at said station, or to such company or carriers, if the same were to be forwarded beyond said station, whose line may be considered a part of the road to the place of destination of said goods or packages; it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where delivered to such person or carrier: provided, no carrier or company forming a part of the line over which such freight is to be transported will be responsible for demurrage or detention at its terminus or beyond on any part of the line arising from any accumulation or over-pressure of business. Upon the following conditions: Freight carried by this company must be removed from the station during business hours upon the day of its arrival, or it will be stored at the owner's risk and expense. In the event of its destruction or damage from any cause while in the depot of the company, it is agreed that the company shall not be liable to pay any damages therefor. It is agreed, and is a part of the consideration of this contract, that the company will not be responsible for the leakage of liquids, breakage of glass or queensware, * * * nor for damages arising to any article carried from the effects of heat or cold. The company will not be responsible for damages on tobacco unless it is proved to have occurred during the time of its transit over this road, and of this notice must be given within thirty hours after the arrival of the same. * * * The responsibility of this company as a carrier to terminate on the delivery of freight, as per this bill of lading, to the company whose line may be considered as a part of the route to the

place of destination of said goods or packages. In the event of the loss of any property for which the carriers may be responsible under this bill of lading, the value or cost of the same at the time and point of destination is to govern in the settlement for the same." Then followed a description of the goods and packages embraced in the bills of lading,—one lot being marked as destined to Granger, Wyo., to Hugh Doak as consignee, and the other lot being marked as destined to Ogden, Utah, for delivery to S. W. Miller as consignee. The evidence tended to show, likewise, that after the arrival of these several lots of goods at Granger and Ogden they were forwarded to Portland, Or., by the direction of the consignor, Goodman,—the Granger shipment being carried over the Oregon Short Line road to Huntington; the Miller shipment, over the Utah & Northern road from Ogden to Pocatello, and thence over the Short Line road to Huntington. At Huntington both lots were received and carried in the ordinary course of business over the defendant's line of road from Huntington to Portland.

There was no evidence whatever tending to prove the condition of the goods when they arrived at Huntington. The goods were shipped from Wyoming without any bills of lading issued therefor. On the back of the bills of lading issued by the Keokuk & Western road at Kahoka, Mo., the following indorsement appeared: "Please have the goods covered by this B. of L. forwarded to Portland,"—signed, "H. Doak and Dr. Lee Goodman," as to the Granger shipment, and signed "S. W. Miller and Dr. Lee Goodman," as to the Ogden shipment. The evidence tended to show that the plaintiff had signed all these names. The plaintiff admitted having given directions to the station agents at Granger and Ogden to forward these goods from those places, respectively, to Portland, Or., and that he wrote the following letter on the train: "8-1st, '88. Green River, Wy. R. R. Freight Agent, Ogden, Utah—Dear Sir: You will please forward the following goods to Portland, Oregon: 10 boxes drugs; 7 boxes sundries; 2 boxes liniment,—via McCamman, Oregon Short Line, to Portland. Shipped by Dr. Lee Goodman, Kahoka, Mo., to S. W. Miller, Ogden, Utah, on July 28, '88. If the goods are not at your depot yet, please wire me at Portland, Oregon, on rect. of this, and oblige Res'p S. W. MILLER. P. S. Let frt. ch's follow goods, etc. P. S. You can authorize agent at Portland, Oregon, to take up the bill of lading or frt, bill I hold, on delivery of goods at Portland, and send same to you at Ogden, etc. Need not have goods uncased, if you can prevent it, at your station, and just forward as directed within this letter."

Plaintiff admitted upon the trial that he wrote this letter, and signed Miller's name to it, while on the train coming west. The condition of the goods at Huntington was unknown. No bills of lading were issued at Ogden or Granger when the goods were forwarded from those points. The goods arrived in Portland in bad condition, more or less damaged and injured. The plaintiff offered in evidence the way-bills which had been issued by the Union Pacific Railway Company at Granger and at Ogden, and which accompanied the goods to Portland. These way-bills were admitted, with the exception of a certain sentence written in pencil, which was excluded. From these way-bills it appeared that the Hugh Doak shipment of goods, when forwarded from Granger, Wyo., was in bad order and condition—barrels leaking, boxes of glassware rattling, and boxes stained. On the way-bill of the Ogden shipment, issued when the S. W. Miller lot was forwarded from Ogden, there was a notation in lead pencil opposite the stamp-mark of the railway office at Pocatello, Idaho (but whether made there or elsewhere it did not appear) as follows: "All this shipment badly broken up; all boxes broken; cans spilled and injured. Repacked here into 15 boxes. Wt. 1810." This pencil notation on the way-bill was excluded from evidence, as stated heretofore, though the way-bill and its contents, except this pencil notation, were admitted by the court, it having been put in evidence by the plaintiff, having been produced by the defendant on notice from the plaintiff therefor. An exception was taken to the exclusion of the pencil notation on the way-bill and subsequently, and in the course of the trial, the defendant itself offered the pencil notation, the plaintiff having offered the way-bill itself; and the court again excluded the pencil notation, and an exception was reserved. The evidence further tended to show, also, that the goods at Granger, Wyo., were in bad condition. The station agent who received them there, and the conductor of the freight train that hauled them there were both sworn, and testified as to their bad condition, the barrels leaking and the boxes rattling and stained; and the railway agent testified that it was because of this condition that the goods were way-billed out of Granger by the railway company as in bad order and condition, as shown by the way-bill. It having been made to appear that the goods were originally shipped from Kahoka, Mo., the defendant identified a certain expense bill rendered by the Keokuk & Western Railway Company to the Union Pacific Railway Company at Kansas City; and the same was offered in evidence, and excluded by the court, and an exception taken. On the face of this expense bill it ap-

peared that the goods referred to were described as being rough barrels leaking at the bungs, and boxes stained. The evidence tended to show that it was the course of business among railways—and, among others, the Union Pacific—to issue way-bills for all goods received for carriage, whether from shippers or from connecting lines, which way-bills accompanied the shipments, and were carried with the goods, and upon which way-bills it was usual to note the character, quality and the condition of the goods, as far as the same was observable from external appearances. The evidence tended to show also that, with reference to the particular case in question, the Union Pacific Railway Company had issued way-bills to accompany the shipment of goods from Kansas City, one way-bill for the Doak shipment to Granger, Wyo., and one for the Miller shipment to Ogden, Utah. These way-bills having been identified as having been issued in the ordinary course of business, and accompanying these shipments from Kansas City to Granger, and from Kansas City to Ogden, they were offered in evidence by the defendant, but were rejected by the court, and exceptions were reserved. From these way-bills it appeared that the goods were way-billed out of Kansas City as in bad order and condition, namely, barrels leaking, boxes stained, and glass rattling in boxes, Exceptions to the refusal to receive these way-bills in evidence were reserved. There was no evidence in the case that any of the goods were injured from negligence, or otherwise after the goods arrived at Huntington, and between that point and Portland, Or., nor was there any evidence that they were in good condition or well packed or boxed at Huntington, and the bill of exceptions so certifies.

The jury returned a general verdict for the plaintiff for $1,500, and at the same time returned answers to certain questions submitted to them by the court as follows: "First, Were the goods and merchandise in the complaint mentioned received at Huntington, Or., for carriage to Portland? Answer, Yes. Second. If the jury answer 'Yes' to the foregoing question, then were these goods and merchandise originally shipped from some town in the State of Missouri in July, 1888, consigned, one lot to Ogden, Utah, and one to Granger, Wyo.? A. Yes. Third. If the jury answer 'Yes' to the last question, then were these goods thereafter, and before being taken by the consignee, directed to be forwarded and forwarded from Granger and Ogden to Portland, and were they carried through from the town in Missouri to Portland by rail? A. We believe they were. Fourth. Were the goods and merchandise in the complaint mentioned, in

July and August, 1888, and before being received at Granger, carried by other railroads east of Huntington, and other than the Oregon Railway & Navigation Company road? A. We believe they were. Fifth. Of the goods and merchandise in the complaint mentioned, was there a shipment, comprising part of the same, arriving at Granger, Wyo., before being forwarded from that point to Portland, Or., and if so, were these goods and merchandise in good order and condition at Granger, Wyo., or were they broken and in bad order and condition at that point, and were they in that condition when arriving at Huntington? A. Slightly leaking and rattling. Sixth. Of the goods and merchandise in the complaint mentioned, was there a shipment comprising part of the same which originally went to Ogden, Utah, before being forwarded to Portland, Or,, and was this shipment in good order and condition at Huntington, Or., and reasonably well packed and boxed before being there received for carriage and carried to Portland? A. We believe they were. Seventh. If the jury find that the plaintiff is entitled to recover, then state how much of the damage which the jury may find is assessed for injury or damage to that lot of goods originally shipped to and arriving at Granger, Wyo., and how much of it to that lot originally shipped to and arriving at Ogden, Utah. A. Miller lot, $571.40; H. D. lot, $24.50." The foregoing questions were submitted at the suggestion of the defendant. The following at the request of the plaintiff: "Were the goods in the complaint mentioned ordered to Portland from Ogden, Utah, and Granger, Wyo., respectively, by defendant, and were they carried and brought forward on such order? A. They were." The court gave judgment on the verdict for the plaintiff, from which the defendant appeals. The exceptions to the ruling of the court in giving and refusing instructions, so far as may be necessary to the proper disposition of the case, will be noticed in the opinion.

W. W. Cotton and *Gilbert & Snow*, for appellant.

U. S. Grant Marquam and *H. N. Steeves*, for respondent.

STRANAHAN, C. J., (*after stating the facts.*)—The plaintiff by his pleadings seeks to confine the inquiry in this case to the shipment from Huntington to Portland; but, during the progress of the trial, both sides found it necessary to inquire somewhat into the condition of the goods prior to their arrival at Huntington. The object of this inquiry on the part of the defendant was to furnish the jury some facts by which they might be able to determine the condition of the goods when they were received by the defendant company.

As the case went to the jury, there was neither allegation nor proof as to whether these goods were in proper condition for shipment at the time the defendant received them.

Way bill in evidence.

The first ruling of the court to which our attention will be directed is the exclusion from the consideration of the jury of the part of the way-bill written in pencil, above referred to. The way-bills were issued by the Union Pacific Railway Company at Granger and at Ogden, respectively; and on their face they tended to show that these goods were not in proper condition for shipment when they were started forward from those points by order of the plaintiff. The way-bill issued at Granger tended to show that the Hugh Doak shipment to that point was in bad order and condition, barrels leaking, boxes of glassware rattling, and boxes stained, and the agent at Granger testified that the shipment from that point was way-billed as being in bad order. It was stated on the face of the way-bill, in pencil, which accompanied the Miller shipment from Ogden: "All this shipment badly broken up; all boxes broken; cans spilled and injured. Repacked here into 15 boxes. Wt. 1810." The court admitted the way-bills, except those parts tending to show the condition of the goods. These were excluded. Those parts were then offered by the defendant, and again excluded. Upon the trial here, counsel for the appellant urged that these portions of the way-bills were a part of the *res gestæ* and admissible as a part of the transaction of the shipment. Whether they are a part of the *res gestæ* seems unnecessary for us to determine, for the reason we think they were admissible on another ground. The plaintiff introduced the way-bills in evidence, and he could not be permitted to select that part which was favorable to his side of the case and exclude a part of the same paper which might operate unfavorably. Of course, if it appeared that the part of the way-bill to which the plaintiff objected had been surreptitiously written by some unauthorized person, it could not affect the rights of the parties, but simply finding it in pencil is not enough. For aught that appears, it was written at the same time that the other parts of the bill were written; and, the plaintiff having made the way-bill evidence by offering a part of it, the defendant had the right to have the entire paper submitted to the jury for whatever they might think it was worth, and its exclusion by the court was error.

There was no evidence in the cause that any of the goods were injured by being transported from Huntington to Portland, nor did it appear from the evidence that they were in good condition or well packed or boxed at the time the de-

fendant received the same from the Oregon Short Line. On this point the defendant's counsel asked the court to instruct the jury: "*First.* There is no evidence in the cause that any of the goods in the complaint mentioned were damaged or injured while the goods were in transit between Huntington and Portland, or after having been received at Huntington for carriage. *Second.* There is no evidence in the cause that the goods in the complaint mentioned were damaged or injured through any carelessness, negligence, or misconduct of the defendant, its servants or employes." These instructions covered several allegations made by the plaintiff, and upon which he apparently based his right to recover in part at least; and, having failed to produce any evidence whatever tending to prove them, it was the right of the defendant to have the court tell the jury directly that the plaintiff was without evidence on these parts. Such instructions would have eliminated that much of the plaintiff's contention from the case, thus narrowing the controversy down to the precise and definite point upon which it must turn.

Instruction—Evidence of damage on defendant's line.

The defendant also asked the court to instruct the jury as follows: "As between shipper and carrier of goods, it is incumbent upon the shipper to so reasonably and securely pack the same that they would not be injured from the ordinary and usual incidents attendant upon a shipment of the same from one point to another; and if the goods are in their nature perishable, or incased in glass, so as to be susceptible of easy breakage, greater care is required of the shipper in the matter of packing and boxing to prevent breakage. A carrier is not liable for injury or damage to goods arising from insecure or imperfect packing or boxing; and if in this case the jury believes that the goods in the complaint mentioned were so imperfectly packed or boxed, and that thereby, and by the ordinary incidents arising from the transportation of such goods, the damage and injury complained of arose, the verdict should be for the defendant." The general rule on the subject of the liability of common carriers of goods is said to be that they are liable for all losses excepting those caused by the act of God or the public enemy, but this definition is said to be misleading. More correctly, it may be said that the carrier is not liable—*First*, for losses caused by the act of God; *second*, losses caused by the public enemy; *third*, losses caused by the inherent defect, quality, or vice of the thing carried; *fourth*, losses caused by the seizure of goods or chattels in his hands under legal process; *fifth*, losses caused by some act or omission of the owner of the goods.

Injuries arising from bad packing.

Lawson, Carr. 5, 6. And further on, the same author states the principle more fully. He says: "Carriers are not liable for losses arising from the ordinary wear and tear of goods in the course of transportation, nor for their ordinary deterioration in quantity or quality, nor for their inherent natural infirmity or tendency to damage; and this rule includes the decay of fruits, the diminution, leakage, or evaporation of liquids; and the spontaneous combustion of goods. In all such cases, where the negligence of the carrier does not co-operate in the loss, he will be excused. This exception also includes all injuries done by living animals to themselves and to each other; losses that are caused by their inherent vices and propensities, and which excuse the carrier if his negligence does not concur in causing them." Lawson, Carr. 15, 16. And the same principles are stated in 2 Am. & Eng. Enc. Law, 853, and abundantly supported by an array of authorities not to be questioned. The instruction asked substantially covered this view of the carrier's responsibility, and should have been given.

The ninth instruction asked by the defendant embodied a correct principle of law, and should have been given. The instruction is as follows: "*Ninth.* If the jury believe from the evidence that the goods in the complaint mentioned were received at Huntington by the defendant for carriage to Portland; that they were carried by the defendant, and arrived in Portland, in the condition in which they were received,—the verdict should be for the defendant." But the failure to give this instruction would not of itself be sufficient to reverse the judgment, for the reason the court gave it substantially in its general charge.

Goods delivered in condition in which they were received.

But in addition to this the court told the jury, among other things, that "the history of the transit from Granger and Ogden to Huntington may or may not have been presented by this testimony, but the goods ought to be presumed by you to be in no worse condition at Huntington than they were at Granger and Ogden. They could hardly be presumed to be in any better condition, but they ought not to be presumed in any worse condition, than they were at Granger and Ogden." Under the particular facts of this case, it seems to us this instruction was inapplicable, and did not declare the correct rule of law. There was some evidence before the jury tending to prove that at one of the points east of Huntington the barrels were leaking at the bungs, glass rattling in the boxes, and the boxes were stained. These facts would clearly indicate that the goods were not in a safe

Presumption as to condition of goods at Huntington.

or proper condition for transportation at that time; and it was a question of fact, for the jury to find from the evidence, what the condition of the goods was when the defendant received them, and whether or not their further transportation in that condition did reduce them to a worse condition than when they were received. It was not a case, then, where any presumption could be invoked, but a question of fact to be found solely upon evidence. Missouri Pac. R. Co. *v.* Breeding, (Tex. App.) 16 S. W. Rep. 184, is authority on this point. In that case the court, having this question under consideration, said: "Negligence or a failure to perform a duty required by law is never presumed as a fact, but must be proved by evidence; and the burden of proving it is on the party seeking a recovery of damages by reason of such negligence or failure of duty. The machine was second-hand, and the plaintiff introduced no evidence showing that it was in good condition, or what was its condition, when received by the company for shipment.

Some other questions were presented at the argument, but we have not deemed their consideration necessary to a proper disposition of this case; but for the errors already referred to the judgment must be reversed, and a new trial awarded.

Connecting Lines—When Liability of Connecting Carrier Commences—Delivery of Goods—Custom.—If, by custom or course of dealing between the receiving and the next connecting carrier, loaded cars are switched off by the former on a side track of the latter's road, for immediate transportation, this amounts to a delivery without further notice; but, if they are to remain on the side track until a way-bill is furnished, or shipping directions are given, there is no delivery to the connecting carrier until this is done, and he is not liable for the loss of the goods by fire while on the platform. Mount Vernon Co. *v.* Ala. Great Southern R. Co. 92 Ala. 296.

Bill of Lading Exempting Carrier from Default of Connecting Carrier—Burden of Proof.—Where a person ships goods under a bill of lading, which exempts the carrier from the default of connecting lines, he has the burden of proving, in an action against the former, that the delay was not due to the latter. Mobile & O. R. Co. *v.* Francis, (Miss. May 25, 1891) 9 So. Rep. 508.

Loss of Goods in Transit—Contents of Barrel Missing—Burden of Proof.—When goods are shipped in a sealed car from New Orleans to Birmingham, under a through bill of lading, and an action is brought against the last carrier for loss or damage, the presumption is, in the absence of proof of loss or damage on the route, that the contents of the car when received by him were in the same condition as when shipped from New Orleans; and a recovery can not be had against him for the contents of a barrel which was found empty when the car was opened, when the evidence does not show how many barrels were delivered in New Orleans, nor in what condition they were. Cooper & Co. *v.* Georgia Pacific R. Co. 92 Ala. 329.

Receipt for Goods Signed by Consignee—Admission of Good Condition.—Receipts and written statements signed by the consignee of goods that

they were in good condition when delivered to him by the carrier amount to no more than an admission of the fact stated, and they are not conclusive of such facts if they are untrue. Missouri Pacific R. Co. *v.* Fennell, 79 Tex. 448.

JENNINGS

v.

GRAND TRUNK R. CO. OF CANADA.

(*127 New York 438.*)

Carriers—Connecting Lines—Contract for Through Transportation.—A carrier which undertakes to transport freight to a point beyond its own line, is liable for any default or negligence occuring on any part of the route, in the absence of any agreement to the contrary; and an agreement by a railroad company to transport goods beyond its own line to the place to which they are consigned, will be inferred from the fact that, in pursuance of an inquiry from the shipper, the company informed him of the through rate, and that the goods were subsequently delivered to the company, and received by it, addressed to such point.

Bill of Lading—Failure of Shipper to Produce or Prove Contents—Presumptions.—Where a shipper, on receiving goods from a carrier at their destination, surrenders the bill of lading or receipt, the fact that he does not produce them or prove their contents at the trial of an action against the carrier, does not give rise to a presumption prejudicial to him as to the terms of the contract of shipment contained therein.

Conditions in Shipping Bills Executed by Persons Delivering Goods—When Shipper is Bound by.—A shipper, to whom the agent of a railroad company contracts for the through transportation of goods without mention of any conditions, is not bound by conditions contained in shipping bills, executed without his knowledge, by the person who delivered for him the property to the company.

Condition Requiring Notice of Claim for Damages - Validity and Application of.—A condition in a contract with a carrier, that no claim for damages, loss of, or detention of goods, shall be allowed, unless notice in writing and particulars of the claim are given to the station agent at or nearest to the place of delivery within thirty-six hours after the goods are delivered, is applicable to shipments beyond the carrier's line as well as to shipments to points on its line; but such a provision is void in so far as it applies to a shipment of a car load of potatoes, since the time allowed for making an examination is insufficient.

Condition Relieving Carrier from Liability for Delay—Delay Caused by Negligence.—A condition in a bill of lading, providing that the carrier shall not be responsible for delay in the transit of the property, does not relieve it from liability for delay occasioned by its own negligence, there being no exemption from liability from that cause expressed in the contract.

APPEAL by defendant from judgment entered upon order of the general term of the supreme court in the fifth judicial department affirming judgment entered on report of referee in favor of the plaintiffs.

For shipment and transportation to East St. Louis, Ill., J.

H. Shanley & Co. caused to be delivered to the defendant, and the latter received, potatoes at the times, places, and in the quantities following; April 18, 1881, at Prescott, Canada, 401 bushels; April 18, 1881, at Edwardsburg, Canada, 812 bushels; April 18, 1881, at Brockville, Canada, 400 bushels; April 20, 1881, at Brockville, Canada, 400 bushels; April 26, 1881, at Kingston, Canada, 402 bushels. The potatoes belonged to J. H. Shanley & Co., who were named as consignees of all the potatoes except those delivered to the defendant at Prescott. They were consigned to the order of the Merchants' Bank of Canada, with directions to advise Shanley & Co., and all the potatoes reached the place of destination except those shipped at Prescott. They did not arrive there. The purpose of this action was to recover damages alleged to have been sustained by the negligence of the defendant in its failure to transport those last mentioned to the place of destination, and for their loss in consequence, and in delaying the delivery at East St. Louis of those which did reach there, by reason whereof the potatoes were injured, and the market price had fallen when they did arrive at that place. The claim of Shanley & Co. against the defendant was assigned to the plaintiffs. The referee found the facts in support of it, and directed judgment against the defendant. The defendant's railway is within the dominion of Canada, of which it is a corporation. Its most westerly station is Point Edward, but its practical western terminus is at Ft. Gratiot, in the state of Michigan, where connection is made with other railroads extending west. The plaintiffs gave evidence to the effect, and the referee found, that on February 8, 1881, Shanley & Co. wrote a letter to the defendant's agent at Toronto, requiring the lowest rates for shipment of potatoes in carload lots from Prescott and other stations in that vicinity on its railway to East St. Louis, Ill., and certain other places, and on the 12th of that month received answer by letter from the defendant's assistant general freight agent, saying: "I will give you the following rates on potatoes in full carloads from Prescott, and stations in the vicinity, to * * * East St. Louis, 28 cents. Be good enough to let me know if these rates are accepted before shipping, so that I may advise our agents." That the rates so given were for each 100 pounds. That on or before April 18, 1881, Shanley & Co. duly accepted such rates, and notified such assistant general freight agent of such acceptance, who, on or prior to that day, so advised defendant's local freight agents at Prescott and stations in that vicinity; and that no notice was given to Shanley & Co. by the defendant, or any of its agents, that the defendant would not assume

the duties and liabilities imposed by law upon common carriers in the shipment of potatoes and their transportation between the points and for the rates mentioned. The alleged defense is that the defendant was not chargeable with the consequences of delay or negligence in the transportation of the potatoes beyond its own railway line; and that there were certain limitations in the contract of affreightment which relieved it from liability, and certain conditions precedent which the plaintiffs' assignors failed to observe. And to support its defense the defendant put in evidence shipping bills termed therein "shipping notes," similar in form, one of which was as follows:

"Grand Trunk Railway Company of Canada. This company will not be responsible for any goods missent, unless they are consigned to a station on their railway. Rates, weights and quantities entered on receipts are not binding on the company, and will not be acknowledged. All goods going to or coming from the United States will be subject to customs charges, etc. Prescott, Date, April 18th, 1881. The Grand Trunk Railway Company of Canada will please receive the undermentioned property, in apparent good order, addressed to J. H. Shanley & Co. East St. Louis, Ill., to be sent by the said company, subject to the terms and conditions stated above and on the other side, and which are agreed to by this shipping note delivered to said company as the basis upon which their receipt is to be given for said property.

No. of Packages and Species of Goods.	Marks.	Weight, lbs.
Paid on.		
		24,000
1 car Potatoes, said to contain 400 bushels, in bulk, O. Risk.	C. T.	
Car 8,679.		
Via Chi. & Alton R. R.		
19 42		
80 58		
100 00		

"J. E. DU BRULE, Consignor."

Among the terms and conditions on the other side of this paper were the following: "General notices and conditions on carriage: (1) It is agreed and understood that the Grand Trunk Railway Co. of Canada will not be responsible for goods of any kind conveyed upon this railway unless receipted for by a duly-authorized agent of the company." "(3) Nor will the company be liable for damages occasioned

by delays caused by storms, accidents, overpressure of freight or unavoidable causes, or by the weather, wet, fire, heat, frost, or delay of perishable articles, or from civil commotion." "(5) And in all cases where herein not otherwise provided the delivery of goods shall be considered complete, and the responsibility of the company shall terminate, when the goods are placed in the company's sheds or warehouse, (if there be conveniences for receiving the same,) at their final destination, or when the goods shall have arrived at the place to be reached on said company's railway. (6) Lumber, coals, bricks, and all other goods carried by the car-load shall be taken as delivered, and the company's responsibility in respect thereof shall cease, upon the car in which they are carried being detached from the train at the station on the company's line to which it is consigned, or at the station where in the usual course of business it leaves the company's line." "(10) That all goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse, (if there be such convenience for receiving same,) pending communication with consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, misdelivery, damage, or detention that may happen to goods so sent by them, if such loss, misdelivery, damage, or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits. (11) That all property contracted for at a through rate, or otherwise, to or from places beyond the line of the Grand Trunk Railway, if shipped by water, shall, while not on the company's railway, or in their sheds or warehouses, be entirely at their owner's risk. In case of loss or damage to any goods for which this company or connecting lines may be liable, it is agreed that the company or line so liable shall have the benefit of any insurance effected

by or for account of the owner of said goods, and the company so liable shall be subrogated in such rights before any demand shall be made on them. (12) That no claim for damage to, loss of, or detention of, any goods for which this company is accountable, shall be allowed unless notice in writing, and particulars of the claim for said loss, damage, or detention are given to station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods in respect to which said claim is made are delivered. (13) Storage will be charged on all freight remaining in the company's sheds or warehouses over twenty-four hours after its arrival." "(15) That the company shall not in any case, or under any circumstances, be liable for loss of market, nor will they be liable for claims arising from delay or detention of any train in the course of its journey, or at any of the stations on the way, or in starting; and the company do not undertake to load or send goods upon or by any particular train, if there be an insufficient number of cars at any station, or the cars cannot be conveniently used for the purpose, or if from any cause cars loaded at a station are unable to be sent on by trains passing or starting from such station." These shipping bills were signed by or in the name of the person who delivered the potatoes to the defendant for Shanley & Co., and the defendant's station agents gave receipts to such persons. None of the receipts were produced in evidence, nor were their contents proved. Further facts appear in the opinion.

E. C. Sprague, for appellant.

Martin W. Cooke, for respondents.

BRADLEY, J., (*after stating the facts.*) The place to which the potatoes were consigned was beyond the line of the defendant's railway; and, unless it had contracted to transport them further than the western terminus of its road, the duty of the defendant required it only to diligently convey the potatoes to that point, and there deliver them to the connecting carrier. Rawson *v.* Holland, 59 N. Y. 611. But the conclusion of the referee was that the defendant undertook to deliver the potatoes at East St. Louis. If that proposition is supported, the defendant was responsible for the consequences of any default or want of reasonable diligence in that respect on any part of the route, unless relieved by some limitation of liability in the contract of affreightment. Root *v.* Great Western R. Co., 45 N. Y. 524; Condict *v.* Grand Trunk R. Co., 54 N. Y. 500, 4 Lans. N. Y. 106. The communications had between Shanley & Co., the plaintiffs' assignors, and the defendant's freight agent on the subject had relation to

Contract for through transportation.

through rates for transportation of the potatoes for Shanley & Co. from the places where they were afterwards delivered to and received by the defendant to East St. Louis. The rates for such purpose were given and accepted. The defendant's station agents at the places of shipment were by the direction of the freight agent, advised of the rates; and the potatoes were delivered, and in carload lots. shipped, consigned to such place of destination. They belonged to Shanley & Co., of which the station agents were also informed at the time of the delivery for shipment. The defendant's railway then had the means of connection at Ft. Gratiot and Detroit with trunk lines of railroad running westerly to Chicago and St. Louis. Although the question whether what had occurred between Shanley & Co. and the defendant's agent constituted an agreement for through transportation was not free from doubt, the finding was justified that it was such that the unqualified delivery and acceptance of the potatoes may have been treated as in pursuance of a contract to transport them to the place of destination. And, in view of the facts and circumstances furnished by the evidence, the conclusion of the referee was warranted that in such event there was an undertaking of the defendant to transport the potatoes to that place unless the contract so represented was modified by some further arrangement. Quimby *v.* Vanderbilt, 17 N. Y. 306; Toledo, P. & N. R. Co. *v.* Merriman, 52 Ill. 123.

Bills of lading —Proof of Contract— Failure to produce at trial.

Upon that subject our attention is called to the shipping bills executed by the persons who performed the act of delivering the property, and to the receipts or bills of lading given to them by the defendant's station agents. As a general rule, the bill of lading given by a carrier to and accepted by the shipper of goods contains the contract for carriage, and, in the absence of fraud, imposition, or mistake, the parties are concluded by its terms as there expressed. Long *v.* New York Central R. Co., 50 N. Y. 76; Kirkland *v.* Dinsmore, 62 N. Y. 171; Hill *v.* Syracuse, B. & N. Y. R. Co., 73 N. Y. 351. In this instance the receipts or bills of lading of all the potatoes which reached the place of destination were there delivered up to the agent of the railroad company from whose custody the property was taken by the consignees. They were not produced at the trial nor were their contents proved. The shipping bills or notes purport to have been requests of the persons subscribing them that the defendant receive the property addressed to the consignees, "to be sent by the said company subject to the terms and conditions stated above and on the other side, and which are agreed to

by this shipping note delivered to the company as the basis upon which their receipt is to be given for said property." Shanley & Co., had no knowledge of the making of the shipping bills, nor did they authorize the execution of them, unless it came within the power incident to the direction given to deliver the property for shipment. It seems that Shanley & Co. purchased the potatoes, and directed their delivery at the defendant's stations by the persons who delivered or caused them to be taken there for such purpose.

Ordinarily, a person authorized to deliver and delivering the property of another to a common carrier for shipment may by the latter be treated as having authority to stipulate for and accept the terms of affreightment, and, as against the carrier, the owner is bound by them. Nelson *v.* Hudson River R. Co., 48 N. Y., 498; Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258. The limitation of the common-law responsibility of the defendant depended upon a special contract to that effect; and the burden of proving such contract was with the defendant. To do this the shipping bills taken and retained by it were produced. On the back of each of these were 21 numbered provisions in fine print. Of these bills it may be assumed that Shanley & Co. had no personal knowledge until they were produced at the trial. They were upon printed blanks kept for the purpose by the defendant, and the referee found that they were made "in conformity with the general requirement or custom of the defendant on the receipt of goods for transportation;" and that Shanley & Co. "then knew it to be the universal custom of railroad companies, so far as their experience went, to require shipping bills to be executed by the shipper, containing the terms and conditions of shipment, upon the delivery of potatoes or similar goods to such companies for transportation." It appears by those bills that the giving of receipts by the defendant's agents was then contemplated. And the referee found that the defendant's receipts or bills of lading, containing some terms and conditions for the transportation of the potatoes were so given, but that no evidence was offered to prove what those terms and conditions were. The contents of those papers constituted in part, at least, the contract, and for the complete proof of it they would seem to have been essential. It evidently was for that reason that defendant's counsel requested the referee to find, which he did, that the contracts executed and delivered by the defendant at the time of the shipment of the potatoes had not been proved, and thereupon insisted that without proving them the plaintiffs were not entitled to recover. There is no legal presumption to the prejudice of the plaintiffs arising out of

the fact that receipts or bills of lading were given, so far as relates to the contract. Those papers had, however, been delivered up at the place and time of the receipt of the property, and it may be assumed that they were accessible to the defendant.

The question arises as to the effect of the terms and conditions of the shipping bills upon the rights of the plaintiffs, and to what extent they operate to relieve the defendant from its common-law duty; and this may depend somewhat upon the authority which the defendant had the right to treat as possessed by the persons signing those bills at the time they were made. Inasmuch as no conditions were mentioned in connection with the information given by the freight agent of the through rates for which the defendant would transport the property, it may be that Shanley & Co. supposed that the common-law duty would be assumed by the defendant as such carrier; and that would have been the situation if no special terms had been provided for when the property was delivered to the defendant. And, although Shanley & Co. had not undertaken to furnish the property for shipment, they had the right to assume, unless advised to the contrary, that when delivered for that purpose it was received pursuant to the arrangement before then made, so far as related to the rates and through transportation; and consistently only with such previous understanding or agreement, the defendant was permitted to treat it as within the authority of the persons who delivered the potatoes to make or accept stipulations or conditions for the reception and carriage of the property by it, and beyond that the owners were not necessarily bound by anything contained in the shipping bills, so far as it was dependent merely upon the presumption of authority of the persons executing them. Treating, as we do upon the facts found, the defendant's contract as one for transportation of the property to the place of destination, the provisions and conditions upon the shipping bills, so far as they may be otherwise construed, are not applicable to the shipments in question. Riley *v.* New York, L. E. & W. R. Co., 34 Hun, 97; Babcock *v.* Lake Shore & M. S. R. Co., 49 N. Y., 491; Condict *v.* Grand Trunk R. Co., 54 N. Y., 500. The conclusion was permitted that not only did Shanley & Co. have no knowledge of the shipping bills, but that the receipts or bills of lading did not come to them until the potatoes were shipped and had gone forward. They were therefore not necessarily charged with any of the terms and conditions (whatever they were) of the bills of lading other than such as the defendant was at liberty to

Effect of conditions in bill —Authority of person signing or shipper.

treat as within the authority of the persons receiving them to accept in behalf of the owners of the property. Coffin *v.* New York Cent. R. Co., 64 Barb. (N. Y.), 379; 56 N. Y., 632; Bostwick *v.* Baltimore & O. R. Co., 45 N. Y., 712; Germania Fire Ins. Co. *v.* Memphis & C. R. Co., 72 N. Y., 90; Guillaume *v.* General Transportation Co., 100 N. Y., 491, 12 Am. & Eng. Corp. Cas., 231; Swift *v.* Pacific Mail Steamship Co., 106 N. Y., 206, 30 Am. & Eng. Corp. Cas., 105; Park *v.* Presston, 108 N. Y., 434. And to that extent, and that only, the terms and conditions of the shipping bills, so far as reasonable and applicable to through transportation of the property by the defendant, must for that purpose be deemed within the contract. But limitation of the common-law liability of the carrier is dependent upon language in the contract fairly requiring such construction without the aid of implication. The provisions to the effect that the defendant would not be responsible for delay in the transit of the property did not have the effect to relieve it from the consequences of delay occasioned by its negligence, as exemption from liability for that cause was not expressed in the contract. Magnin *v.* Dinsmore, 56 N. Y., 168; Mynard *v.* Syracuse, B. & N. Y. R. Co., 71 N. Y., 180; Nicholas *v.* New York Cent. & H. R. Co., 89 N. Y., 370, 9 Am. & Eng. R. Cas., 103. There was evidence upon the subject, and by it was supported the finding of the referee, that the loss suffered and the damages sustained by the plaintiffs' assignors were caused by the defendant's negligence in transporting the potatoes.

Liability for delay.

Among the terms and conditions on the back of the shipping bills was one numbered 12, which provided "that no claim for damages to, loss of, or detention of any goods for which this company is accountable, shall be allowed, unless notice in writing and particulars of the claim for said loss, damage or detention are given to station freight agent at or nearest to the place of delivery within 36 hours after the goods in respect to which said claim is made are delivered." No such notice was given. The referee refused to give effect to it upon the request of the defendant's counsel, and exception was taken. The view of the referee was that this provision was not applicable to shipments beyond the terminus of the defendant's railway. The place of delivery was East St. Louis. And the same reason for the requirement of the notice when the place of delivery by the defendant is beyond its own line of road exists for it as when such place is upon its railway. The purpose of the notice evidently was to enable the carrier to investigate the nature, cause, and extent of the injury

Notice of claim for damages.

or damages claimed, with a view to the means of the protection which such opportunity may afford. It is the accountability of the defendant for damages that renders the notice essential, and by the terms of the clause in question no other condition is required. It is true that other clauses are to the effect that the defendant should not be responsible beyond its own railway for goods passing over it, and from it on to other roads, but it is contemplated that its cars containing goods might go forward on connecting railroads to the place of destination. It is not seen how that fact can qualify or limit the purpose of the notice. The delivery in view is to the consignee. This can be done only at the place to which the goods are consigned. Before delivery there, he may not be supposed to have either the opportunity or means of giving the notice.

It is legitimate for a common carrier, by contract with the shipper, to provide for a reasonable time within which notice of claim for loss or damage shall be given as a condition of liability, and the manner of giving it. Southern Express Co. *v.* Caldwell, 21 Wall. (U. S.), 264; Southern Express Co. *v.* Hunnicutt, 54 Miss., 566; Lewis *v.* Great Western R. Co., 5 Hurl. & N., 867. In those cases the notices provided for were held to be reasonable. And that question is an open one for consideration. Westcott *v.* Fargo, 61 N. Y., 542, 551; Adams Express Co. *v.* Reagan, 29 Ind., 21. In this present case each car contained 400 bushels and upwards of potatoes. The time in which the condition required notice to be given might not include more than 12 business hours to ascertain the requisite particulars of the claim for the purpose of the notice. It is easy to see that the specified time of 36 hours would be inadequate to the necessity that might exist in a case like the one under consideration. The conclusion was permitted that, in view of the character and extent of the property, and the nature of the claim for damages which might and did arise, the time specified within which to give notice, with particulars, was quite unreasonable; and therefore, and for that reason, the condition in that respect was inapplicable to the shipments in question, and the failure to give such notice was no bar to the remedy. This view renders it unnecessary, in the consideration of the effect of such condition, to refer further to the circumstances under which the shipping bills were made, in view of the fact that it does not appear that the condition was in the bill of lading. No other question seems to require the expression of consideration. The judgment should be affirmed.

All concur, FOLLETT, C. J., in result.

Connecting Lines—When Railroad Company will be held to have Contracted to Carry Goods to their Destination.—See Beard *v.* St. Louis, A. & T. H, R. Co. (Iowa), 42 Am. & Eng. R. Cas., 509; Hunter *v.* Southern Pacific R. Co. (Tex.), 42 *Id.*, 501; Atlanta & W. P. R. Co. *v.* Texas Grate Co. (Ga.), 40 *Id.*, 130; Alabama Great Southern R. Co. *v.* Mt. Vernon Co. (Ala.), 35 *Id.*, 657, note, 662; Rickerson Roller Mill Co. *v.* Cedar Rapids & I. R. Co. (Mich.), 32 *Id.*, 487, note 496; Atchison, T. & S. F. R. Co. *v.* Roach (Kan.), 27 *Id.*, 257; Louisville & N. R. Co. *v.* Mayer (Ala.), 27 *Id.*, 44; Peneira *v.* Central Pacific R. Co. (Cal.), 18 *Id.*, 565; Louisville, etc., R. Co. *v.* Weaver (Tenn.), 16 *Id.*, 218; Piedmont Manufacturing Co *v.* Columbia, etc., R. Co. (S. Car.), 16 *Id.*, 194; Knight *v.* Providence & W. R. Co. (R. I.), 9 *Id.*, 90; Cummins *v.* Dayton & U. R. Co. (Ind.), 9 *Id.*, 36. note 39; Lindley *v.* Richmond & D. R. Co. (N. Car.), 9 *Id.*, 31; Michigan Central R. Co. *v.* Myrick (U. S.), 9 *Id.*, 25; Baltimore & O. R. Co. *v.* Campbell (Ohio), 3 *Id.*, 246.

Liability of Initial Carrier for Delay of Connecting Carrier in Forwarding Goods.—In the absence of any contract by the initial carrier to deliver goods at their destination at a point beyond its line, its common law liability is to deliver such goods in good order to the connecting line within a reasonable time; and it is not liable for any subsequent delay in forwarding the goods, by reason of which they were delivered in a damaged condition. Central R. & B. Co. *v.* Skellie, 86 Ga., 686.

Validity of Stipulation in Bill of Lading Requiring Notice of Claim for Damages.—See Baltimore & O. Express Co, *v.* Cooper (Miss.), 40 Am. & Eng. R. Cas., 97, and cases cited in note, 98; Good *v.* Galveston, H. & S. A. R. Co. (Tex.), 40 Am. & Eng. R. Cas. 98, and note 103; Grand Trunk R. Co. *v.* McMillan (Can.), 42 Am. & Eng. R. Cas., 468; Western R. of Alabama *v.* Harwell (Aia)., 45 Am. & Eng. R. Cas., 358.

Limitation of Time for Presenting Claim—Application where Portion of Shipment was not Delivered.—A clause in a bill of lading, providing that any claim for loss or damage shall be made within 36 hours after delivery, does not apply to a claim for the value of a portion of a shipment of goods not delivered. Galveston, H. & S. A. R. Co. *v.* Ball (Tex., April 28, 1891), 16 S. W. Rep., 441.

Same—Waiver by Carrier.—A statement by the agent of a railroad company upon the delivery of a part of a shipment of merchandise, that the remainder was missing and would be delivered in a few days, is a waiver of a clause in a bill of lading providing that claims of loss or damage must be made in 36 hours after delivery. Galveston, H. & S. A. R. Co. *v.* Ball (Tex., April 28, 1891), 16 S. W. Rep., 441.

SMITH *et al.*

v.

WESTERN R. OF ALABAMA.

(*91 Alabama 455.*)

Carriers—Act of God—Overflow of River.—Where injury to goods in the possession of a carrier is caused by an unprecedented flood in a river, which no prudence could anticipate, the water rising suddenly during the night and entering the car in which the goods were before they could be reached and rescued, the injury is attributable to the act of God, and the carrier is not liable.

APPEAL from Lee, Circuit Court.

This action was brought to recover damages for injury to goods which were shipped under a contract made with a receiving carrier in Baltimore, Md., of which defendant was a connecting line, by the consignor of plaintiffs, for the safe transportation of said goods to Opelika, a station on the line of defendant corporation. The defendant set up the defense that the injury was caused by an act of God.

A. & R. Barnes, for appellants.

Harrison & Ligon, for appellee.

COLEMAN, J.—The action is to recover damages for an injury to goods, alleged to have been caused by the fault or negligence of the defendant as a common carrier. The principal defense relied on is that the damage resulted from an act of God, without the fault or negligence of the defendant. All the authorities hold that a common carrier is not liable for injuries or damages caused by an act of God, if there is no fault or negligence on its part. 2 Am. & Eng. Enc. Law, p. 746; Ellet *v.* St. Louis, K. C. & N. R. Co. 76 Mo. 518, 12 Am. & Eng. R. Cas. 183, and notes; Baltimore & O. R. Co. *v.* Sulphur Spring Ind. School Dist. 96 Pa. St. 65, 2 Am. & Eng. R. Cas. 166; Memphis & C. R. Co. *v.* Reeves, 10 Wall. (U. S.) 176.

Carrier not liable for act of God.

As stated in the case of Columbus & W. R. Co. *v.* Bridges, 86 Ala. 452, 38 Am. & Eng. R. Cas. 136, railroads "are not bound to provide against unusual or extraordinary floods, such as have never been known to occur previously, and which could not have reasonably been foreseen by competent and skillful persons." See, also, opinion of STONE, J., in case of Steamboat Co. *v.* Barclay, 30 Ala. 126.

An act of God is a cause which no human prudence or power could prevent or avert. While it is true that no human agency can prevent or stay an act of God, the act itself being that of omnipotence and irresistible, it is frequently the case that the results or natural consequences of an act of God, by the exercise of reasonable foresight and prudence may be foreseen and guarded against. Where this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence, and subject the party upon whom this duty developed to damages, although the original cause was an act of God. Notice of an extraordinary rise at the head of a river might be sufficient to parties engaged in business lower down to expect a proportionate rise, and to prepare for it, dependent more or less upon the suddenness of the rise, and the time after notice, and before the rising water

Flood was an act of God.

reached the place where the injury occurred.

The car in which were appellant's goods, destined for Opelika, was stopped at West Point on account of a wash-out in the road five miles west of West Point, on the route to Opelika, and while in the car the goods were damaged by an overflow of the river. The undisputed evidence is that "it was the greatest overflow ever known in West Point; that the water rose thirty-seven inches higher than it ever rose before within the memory of man;" "that the water was never known before to rise high enough to get into the freight cars standing on the side track;" "that in this case the water covered the floors of the freight cars to a depth of eighteen inches," and caused the damage complained of by plaintiffs.

No human power could have stayed the flood, or foresight or prudence anticipated such an overflow. It is contended that, if the train had remained in Le Grange, Ga., or the car had been rnn out on the main track, the goods would have escaped injury. It is no proof of negligence that because after the injury has resulted it can then be seen how the injury might have been avoided. The question is, what notice or knowledge had the defendant, from which such an overflow could reasonably have been anticipated or foreseen? Beatty *v.* Central Iowa R. Co. 58 Iowa 242, 8 Am. & Eng. R. Cas. 210. In this case the proof shows none.

Was there any fault or negligence on the part of the defendant for not removing the goods to a safe place, after it became reasonably known that the high water would reach the goods where stored in the cars? On Monday night the goods were left in the cars, to all human knowledge in a place of safety. On Tuesday morning the water had overflowed the entire railroad track. It seems that the engineer and crew used all reasonable diligence consistent with personal safety after daylight and information of the overflow, to procure a batteau, in order to reach the car where the goods were stored. The engineer testifies he tried to get up steam, but the water had entered the fire-box of the engine. That then all was done that could be done to save the goods, but without avail, the water continuing to rise in the cars to a depth of eighteen inches above the floors. There was no evidence introduced or offered to controvert this statement of the facts of case. Whether the court below erred in the admission or exclusion of testimony offered, or in the charges given or refused, the undisputed facts show that the defendant was entitled to the general charge in its favor. Moody *v.* Walker, 89 Ala. 619; Stephens *v.* Regenstein, 89 Ala. 561, ; Draper *v.* Nixon, 8 So. Rep. 489 (present term).

Affirmed.

What Constitutes an Act of God Which Will Relieve a Carrier from Liability.—See Gleason *v.* Virginia Midland R. Co. (U. S.) 47 Am. & Eng. R. Cas. 513, and cases and notes referred to on page 520.

COX *et al.*

v.

COLUMBUS & WESTERN R. Co.

(*91 Alabama, 392.*)

Carriers—C. O. D. Shipments—Delivery of Goods without Payment of Price.—From the mere nature of his business, no obligation devolves upon a common carrier to require payment of the price of goods transported by him as a condition of their delivery to the consignee. Such obligation arises only by contract, express or implied. Such agreement may be implied when the carrier accepts the goods for transportation with instructions not to deliver until paid for, or when they are so clearly marked as to indicate that payment is a condition of delivery, if making such collections has been his custom in conducting his business.

Agreement of Station Agent with Shipper to Collect Price of Goods—Misdelivery.—A local station agent of a railroad company has no authority, by virtue of his employment, to assume, on behalf of the company, to collect the price of goods on delivery to the consignee; and if he makes an agreement to that effect with the shipper, he becomes the agent of the latter, and the company is not liable for a breach of such contract by him.

APPEAL from Lee Circuit Court.
J. M. Chilton, for appellants.
Harrison & Ligon, for appellee.

CLOPTON, J.—A brief statement of the averments of the several counts of the complaint, five in number, is requisite to a proper understanding of the questions raised by the assignments of error, which go to the rulings of the court overruling demurrers to the special pleas of defendant. The first count substantially avers that plaintiffs during the years 1883, 1884 and 1885, shipped at different times a number of barrels of whiskey from Atlanta, Ga., to Goodwater, Ala. The Atlanta & West Point Railroad Company issued through bills of lading for the transportation of the whiskey over its own and connecting lines, in pursuance of an agreement between the companies operating the respective roads. That, by the bills of lading, the goods were to be delivered to the order of plaintiffs, who indorsed and delivered the bills of lading to defendant, the delivering carrier, with the understanding and agreement that the goods were to be delivered to one Caldwell upon payment of the

Case stated.

price; to whom, the count avers, they were delivered without payment. The third count contains substantially the same averments, with the exception that it avers defendant collected the price and has refused to pay the same to plaintiffs. The second count avers the same facts as to the shipment of the goods, the issue of through bills of lading, the agreement under which they were issued, and their consignment to the order of plaintiffs. The fourth count is the same as the second, except it omits the averment of the issue of through bills of lading, and avers that, by agreement between the several companies over whose roads the goods had to pass, defendant undertook their transportation from Opelika to Goodwater, and to deliver them to the order of plaintiffs. The fifth count merely avers the shipment of the goods, their consignment to plaintiffs and their reception and transportation by defendant from Opelika to Goodwater. The second, fourth and fifth counts aver a misdelivery. In addition to the general issue, defendant filed two special pleas. The first avers that plaintiffs employed one Driver, who was defendant's agent at Goodwater, to represent them in delivering the goods to Caldwell and collecting the price of the same, and for this purpose sent him bills of the goods with the request that he would collect the same and transmit to plaintiffs; that Driver did from time to time collect the bills from Caldwell and transmit to plaintiff, who paid him for the service; also that in delivering the goods to Caldwell and collecting the price he did not act within the scope of his authority as defendant's agent, but in utter disregard of his duties and instructions as such, and in thus acting was the agent of plaintiffs, employed and paid by them.

From his mere avocation, or the nature of his business, no implied obligation or duty devolves on a common carrier to require payment of the price of goods transported by him as a condition of their delivery. Such obligation arises only by contract, express or implied. Such agreement may be implied when the carrier accepts the goods for transportation, with instructions not to deliver until paid for, or they are so clearly marked as to indicate that payment is a condition of delivery, if making such collections has been his custom in conducting his business. A delivery in such case, in violation of the condition, is unauthorized and tantamount to a misdelivery. Murray *v.* Warner, 55 N. H. 546; Meyer *v.* Lenicke, 31 Ind. 208; Jelletts *v.* St. Paul, M. & M. R. Co., 30 Minn. 265, 16 Am. & Eng. R. Cas. 246; 2 Am. & Eng. Enc. Law, 899; Hutch. Carr. §§ 389–391.

Duty of carrier to make collection.

The complaint does not allege the goods were so marked

as to signify that collection of the price was a condition of delivery, or that an agreement to that effect was entered into by the company with whom the contract for through shipment was made. The allegation is that, the goods being deliverable to the order of plaintiffs, they indorsed and delivered the bills of lading to the defendant, with an agreement that they were to be delivered to Caldwell upon his payment for the same, an agreement distinct from the contract of shipment and subsequent to the issue of the bills of lading. The averments of the plea are inconsistent with the theory that Driver made the agreement as the agent of and for defendant. The plea sets forth a special agency for plaintiffs, distinct from and independent of his agency for defendant. As local agent he had no implied authority, either in anticipation of the arrival of the goods, or after they had been carried to the point of destination, to make an agreement to deliver them upon payment of the price, binding the company; and though, by the bills of lading the goods were to be delivered to the order of plaintiff if they employed and authorized Driver to represent them in the matter of their delivery to Caldwell, and collection of the price, a delivery by him without payment did not constitute a misdelivery on the part of defendant. The specific grounds of demurrer—that the plea does not distinctly aver that Driver acted as plaintiffs' agent, and for aught that appears, he was also acting as agent for defendant, in the matter of the delivery of the goods to Caldwell—are not well founded.

Delivery by agent without payment.

The second special plea is directed to the first, second, third and fourth counts of the complaint. It merely avers that the contract relative to the collection and transmission of the price of the goods, if any such contract was made, with Driver or with the Atlanta & West Point Railroad Company, was in excess of the authority delegated to such agent or the receiving carrier, and of the corporate powers of defendant. Neither count of the complaint alleges that any such contract was made with Driver or with the Atlanta & West Point Railroad Company. The plea presents an immaterial issue. Also, while it professes to answer four counts of the complaint, it is obvious that it is not an answer to two of them—the second and fourth counts. These counts merely aver a misdelivery without reference to any agreement in regard to the collection and transmission of the price of the goods. The elementary rule that a plea professing to answer the whole complaint, and answering only a part, is bad on demurrer applies when the complaint contains more than one count, and the

Defective plea.

plea, professing to answer all, answers only some of rhem; and, as we have seen, such contract, if made by defendant, is not *ultra vires*. The demurrer to the plea should have been sustained.

Error without injury.

The doctrine of error without injury, most frequently invoked when a demurrer to a specific plea is sustained, and it appears that defendant had the full benefit of the defense under the general issue, has no application when a demurrer to a special plea has been erroneously overruled and plaintiffs compelled to take issue on it. Montgomery & E. R. Co. *v.* Chambers, 79 Ala. 338. For the error in overruling the demurrer to the second special plea, the judgment must be reversed. Reversed and remanded.

Undertaking of Carrier to Collect Price of Goods on Delivery—C. O. D. Shipments.

1. The Carrier's Undertaking—Use of Words C. O. D.—It is now generally understood, both in business and transportation circles, that the letters C. O. D., marked upon a package to be carried, are the initials of the words "collect on delivery," and mean that the carrier is to collect of the consignee on delivery the amount due from him and marked on the package, and to return such amount to the consignor. "This is the experience of the whole business community employing such an agency." American Express Co. *v.* Lesem, 39 Ill. 312; American Merchants' Union Ex. Co. *v.* Schier 55 Ill. 140. These letters have nothing to do with the transportation charges upon a package. American Merchants' Union Express Co. *v.* Schier, 55 Ill. 140. It has been decided in Missouri and New York that the courts will not take judicial notice of the meaning of the letters C. O. D., and that their meaning is a question for the jury. McNichol *v.* Pacific Express Co. 12 Mo. App. 401; Collender *v.* Dinsmore, 55 N. Y. 205. In the latter case, ALLEN, J., said: "The letters C. O. D., followed by an amount of money in dollars, have come to be very well understood in the community and by the public, but perhaps could not, without the aid of extrinsic evidence, be read and intrepreted by the courts; that is, their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purposes for which these letters are used." On the other hand, in Maine and Indiana it has been decided that courts and juries, from their general information, may take the initials C. O. D., when affixed to packages sent by common carriers, to mean that delivery is to be made upon payment of the charges due the consignor for the price, and the carrier, for the carriage of the goods. State *v.* Intoxicating Liquors, 73 Me. 278; United States Express Co. *v.* Keefer, 59 Ind. 263. In Illinois, it was held that the fact that the goods transported by an express company were marked C. O. D. would not of itself, unexplained, be sufficient evidence of an agreement that the company was to collect the price for which the goods were sold, but when, in addition to such fact, the plaintiff testified thatthe goods were to be shipped and the amount marked on them collected, it ought to be sufficient, especially upon a point upon which there was no controversy before the jury. American Merchants' Union Ex. Co. *v.* Wolf, 79 Ill. 430. But in order to introduce parol proof of the sense in which the letters C. O. D. were used, it is necessary, in a suit brought upon a contract embodied in the letters, to aver in the declaration that they were used in

the sense contended for. American Express Co. *v.* Lesem, 39 Ill. 312.

A railroad company, which receives a package marked C. O. D., cannot be charged with the collection of the price of the goods, where the proof shows that such duties were never undertaken by it in any case, and that no bill for the price of the goods was ever delivered to the company by the consignor, and that the receipt given contained no language indicating any undertaking to make such collection. Chicago & N. W. R. Co. *v.* Merrill, 43 Ill. 425. And it seems that an endorsement upon the bill "please collect the bill," is a mere request with which the carrier may or may not comply, and is not of itself sufficient evidence of an undertaking on his part not to deliver the goods unless paid for. Tooker *v.* Gormer, 2 Hilt. (N. Y.), 71. But it has been held that where the agent of an express company gives a receipt for goods, in which the letters C. O. D. are used, the company is bound by the contract, since it was made in the regular course of its business. American Express Co. *v.* Lesem, 39 Ill. 312. The contract by which a carrier agrees to collect the price of goods transported by him may be verbal, however, and need not be incorporated in the carrier's receipt. Union R. Co., etc., *v.* Riegel, 73 Pa. St. 72.

The ordinary character of a shipment is not affected by the words C. O. D. under the contract thereby expressed, until the collection is in fact made. Gibson *v.* American Merchants' Union Express Co., 1 Hun (N. Y.), 387.

2. Liability of Carrier Failing to Make Collection—Wrongful Deliveries.—Where a certain sum is mentioned in the bill of lading as "charges to be collected." the carrier is liable for the charges he assumes to collect if he delivers the goods without making such collection, thereby surrendering the securitywithout authority. Meyer *v.* Lemcke, 31 Ind. 208; Tooker *v.* Gormer, 2 Hilt. (N. Y.), 71. The carrier is guilty of conversion if he delivers the goods without payment and without the consignor's consent. Jelletts *v.* St. Paul, M. & M. R. Co., 30 Minn. 265, 16 Am. & Eng. R. Cas. 246. He may however discharge himself from liability in such case by procuring the return of the goods. Tooker *v.* Gormer, 2 Hilt. (N. Y.), 71. And an unauthorized delivery of goods may be ratified by the consignee. Converse *v.* Boston & M. R. 58 N. H. 521; Dobbin *v.* Michigan Central R. Co., 56 Mich. 522.

The consignor or the bailee of goods shipped C. O. D. may sue on the carrier's contract, where neither the goods nor the charges thereof, are returned to him. United States Express Co. *v.* Keefer. 59 Ind. 263; Murray *v.* Warner, 55 N. H. 546.

In an action against an express company by the consignor of goods, which were delivered to the consignee without the price being collected, which was marked on the package after the letters C. O. D., it is not competent for the company to prove by parol that goods, which had on prior occasions been sent by the same consignor to the same consignee and a receipt given therefor, were delivered to the consignee without payment being made as required upon an understanding to that effect between him and the consignor, since such an arrangement, in regard to prior transactions, did not preclude the company from contracting not to deliver the goods until the money was paid, and such proof would change the legal import and effect of the written contract, which cannot be done by parol. American Express Co. *v.* Lesem, 39 Ill. 312.

Where goods are not delivered to an express company, but are sent by railway to their place of destination consigned to the purchaser in the care of the express company's agent at that place, and never come into his possession, but are delivered by the railway company directly to the purchaser, without fault of the express company or its agent, and a bill of such goods, sent also to such agent for collection, not being paid by the

purchaser, is promptly returned by the agent, no liability of the express company to the consignor is created by these facts. Wells *v.* American Express Co., 44 Wis. 342.

If a carrier, who has transported goods marked C. O. D. receives the consignee's check payable to the consignor's order for the amount, which the consignor accepts without objection, and such check proves to be worthless, the consignor has no cause of action, even though the drawer had no funds in the bank when the check was drawn. Rathbun *v.* Citizens' Steamboat Co., 76 N. Y. 376. When an express company delivered goods to a consignee, which were required to be paid for before delivery, receiving only part payment, but remitted the portion so paid to the consignor, the consignor has no right to apply such payment on other indebtedness due him from the consignee, but must credit it to the company. American Express Co. *v.* Lesem, 39 Ill. 312.

When the carrier delivers the goods without receiving the price, contrary to instructions, the damages, which the shipper suffers, are the very damages which were within the contemplation of the parties and against which the contract was to protect them, namely, the price of the goods. Hutchings *v.* Ladd, 16 Mich. 493. But the carrier may show, in mitigation of damages, that the consignee has subsequently settled for the goods. Jelletts *v.* St. Paul, M. & M. R. Co., 30 Minn. 265, 16 Am. & Eng. R. Cas. 246.

3. Refusal of Consignee to Receive Goods.—If the consignee peremptorily refuses to receive goods marked C. O. D., the carrier will be justified in returning them immediately to the consignor. He is not under any obligation to do so, however, in any event until he is so instructed. He may give notice to the consignor of the refusal and await his instructions in regard to them. Hutchinson on Carriers, § 392. After the refusal of the consignee to accept a package sent C. O. D. the carrier holds it as a warehouseman, and is liable only for negligence. Gibson *v.* American Merchants' Union Express Co., 1 Hun (N. Y.), 387; Hutchinson on Carriers, § 392. If the goods are refused by the consignee the carrier may return them to the consignor, or, if the title is changed after receiving them, or if neither the consignor nor the consignee had title to the property when the carrier received it, he may absolve himself by delivering the property to the true owner. American Express Co. *v.* Greenhalgh, 80 Ill. 68.

The undertaking of the carrier to collect on delivery does not necessarily keep him strictly liable as a common carrier where, while the consignee delays payment upon a demand and tender of the goods, and the property continues in the carrier's warehouse. Weed *v.* Barney, 45 N. Y. 344; Schouler's Bailments & Carriers (2d Ed.), § 507

4. Consignee's Right to Inspect Goods.—A tender of goods does not mean an offer of packages containing them, but an offer of those packages under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before called upon to part with his money, of seeing that the goods so presented for his acceptance are in reality those for which he bargained. Lyons *v.* Hill, 46 N. H. 49; Isherwood *v.* Whetmore, 11 M. & W. 347; Avery *v.* Stewart, 2 Conn. 74. Accordingly, where a package of goods is forwarded by a carrier, to be paid for on delivery, the consignee is entitled to a reasonable opportunity to inspect them before he accepts them; and the carrier may afford him reasonable facilities for doing so, without making himself chargeable for the price, even if he put them into the hands of the consignee for that purpose, receive from him the price as personal security to the carrier that the goods shall be returned, if not accepted, after a reasonable opportunity to examine them. Lyons *v.* Hill, 46 N. H. 49.

5. Return of Money Collected.—If the shipment and transaction on the part of the consignor is a piece of swindling, the law will lend no aid in the collection of moneys for the satisfaction of such a claim. In such case, it is the duty of the agent of the carrier to pay back the money on the discovery of the fraud and notice thereof, if the money is then in his hands. This was decided in the case where an express company carried a box marked C. O. D., and the sum charged thereon was paid by the consignee, and the package on being opened proved to be worthless and a swindle on the part of the consignors, and the agent of the express company, on the discovery of the fraud, returned the money to the consignee. Herrick *v.* Gallagher, 60 Barb (N. Y.), 566.

When the money has been received for the goods which have been sent with the understanding that the carrier is to collect for them and bring back the money, he becomes responsible for its return to the consignor as a common carrier as soon as he has received it, whether he receives any distinct compensation for carrying it or not. Kemp *v.* Coughtry, 11 Johns (N. Y.), 107; Harrington *v.* McShane, 2 Watts (Pa.), 443; Taylor *v.* Wells, 3 Watts (Pa.), 65; Emery *v.* Hersey, 4 Me. 407; Zollinger *v.* The Steamer Emma, 3 Cent. L. J. 285; Hutchinson on Carriers, § 392.

6. Notice of Value of Package.—Where a package is sent by express marked "C. O. D. $292," this is ample notice to the carrier of its value, so as to enable the owner to recover beyond the extent of $50 as of limit in the receipt given. Van Winkle *v.* Adams Express Co., 3 Robt. (N. Y.), 59.

STANDARD OIL CO.

v.

TIERNEY.

(*Kentucky Court of Appeals, Dec. 10, 1891.*)

Carriers—Negligence of Shipper—Dangerous Freight—Injury to Employe.—A shipper of naphtha is bound to so mark the barrels that the employes of the carrier may ascertain its explosive nature. It is a question for the jury, in an action for injuries received by a conductor owing to an explosion, whether it is a compliance with this rule to brand across the heads of the naptha barrels the words "Unsafe for Illuminating purposes," the naptha having been billed as "carbon oil."

Naptha Billed as Carbon Oil—Evidence as to Contract with Company.—In order to show the good faith of the shipper in billing as "carbon oil" certain barrels of naptha, which exploded and injured a conductor on the train, evidence of a contract with the company whereby naptha was to be carried at the same rate as carbon oil, is admissible, but such evidence is not admissible for the purpose of showing knowledge by the conductor, since notice to the company was not notice to him.

APPEAL from Louisville Law and Equity Court.

Action to recover for personal injuries. Verdict and judgment for plaintiff for $25,000. Defendant appeals.

Humphrey & Davie, for appellant.

Willson & Thum, *Wm. Lindsay*, and *W. W. Thum*, for appellee.

PRYOR, J.—In April of the year 1888 the Standard Oil Company, at its place of business in the city of Louisville, loaded two cars belonging to the Louisville & Nashville Railroad Company with oil. One of the cars contained 65 barrels: 35 of those barrels being naphtha oil, and the remainder the ordinary illuminating oil. This car was loaded by the company, the car being on a side track near its warehouse, belonging to the Louisville & Nashville Railroad, and was intended to be shipped south. The testimony shows that the cars were known as "cattle cars," with open lattices, and that offered by the defense shows that the oil was in barrels that had been carefully inspected, and such barrels as were generally used in shipping naphtha or other products of petroleum, and the barrels containing naphtha branded, as they maintain, as required by the statute "Unsafe for illuminating purposes." The head of the barrel was painted white, with this brand in black letters in the center. The cars were taken from this switch by the Louisville & Nashville road by its freight engine or train in charge of the appellee, who was the conductor. After leaving Louisville, when some 20 or 30 miles from the city, the appellee discovered that oil was leaking from some one of the barrels, and after passing one or two depots, he directed one of the employes to ascertain where the leak was. There is a window about two feet square at the end of the car, to which the employe climbed with his lantern, and, passing through this window into the car, discovered the barrel that was leaking. The appellee being informed by the employe of the condition of the barrel, the two, with a lamp each, passed through this window into the car, and finding that they could not handle the barrel, the appellee called for another employe, who passed through this window with his lamp. They set their lamps on the heads of the barrels, and proceeded to raise the leaking barrel from the floor, when by the motion of the barrel, or its peculiar position when being moved, the naphtha spouted out in a stream as large as a pencil, took fire from the burning lamp, and seriously injured the appellee. Whether the liquid was thrown on the lamp or the explosion took place from the vapor produced by the naphtha is a mooted question. The appellee was badly burned, and instituted this action against the appellant to recover damages for the injury, alleging that this naphtha was shipped as carbon oil, and that he had no notice whatever of the inflammable character of the fluid. He claimed damages to the amount of $25,000, and that sum the jury awarded him. He was badly burned about the face, so much so as to disfigure him for life; suffered much pain and anguish for

Case stated.

several months; lost the use of his left arm, and his right hand is to some extent injured; his feet were also badly burned; but the principal injury after his recovery consists in the loss of the use of his left arm, and the disfigurement of his face.

The defense relies upon various grounds for a reversal: (1) That it took all the necessary care and precaution in shipping the oil: that it marked it "Unsafe for illuminating purposes:" that the carrier knew the car contained barrels of naphtha; and that the entire product of petroleum had been shipped and was being shipped as carbon oil under an agreement to that effect with the railroad company; and that it was the duty of that company to have notified its employes of the danger. (2) That the court erred in admitting incompetent testimony, and in denying to the defendant the right to introduce testimony that was competent. (3) In giving erroneous instructions to the jury, and in refusing to give defendant's instructions. (4) The damages are excessive.

There were numerous instructions asked by the plaintiff and the defendant, all of which were refused, and the instructions prepared and given by the trial judge.

Sufficiency of Brand—Effect of notice to company.

In determining the questions raised by the instructions it will be necessary to notice the testimony for the defense that was excluded, as this testimony, if admitted, must have an important bearing on the issue in establishing at least its good faith on the part of the appellant in delivering this naphtha to the carrier. It was offered by way of defense on the part of the appellant that the railroad company, whose agent and employe the conductor was at the time of the injury, knew that this car contained naphtha, and, if not, that under an agreement with the company through its officials it had been shipping on its cars barrels of naphtha for a long period, branded in the manner specified, with bills of lading under the general designation of "carbon oil," the railroad company knowing that the term embraced naptha, and taking it with that understanding, charging the same freight and shipping it as any other oil. The court refused to permit this testimony to go to the jury, and this is one of the errors complained of. It is evident that if the owner, when shipping explosive or combustible substances, fails to notify the carrier or his agent of the danger attending its use when transporting it, and an injury results to the employes of the carrier, the owner is liable for the injury sustained; but when the carrier is notified of the dangerous article or product, (and there is none more so than naphtha when com-

ing in contact with a burning lamp or with fire,) and there is marked on the head of the barrel that which must necessarily apprise the carrier of its dangerous nature, and the carrier in his ordinary line of business undertakes to transport it, and an injury occurs to one of its employes, the question then arises, is the shipper liable because knowledge was not brought home to its employe? We think not. This, however, is not the question arising in this case. It is the mode of shipping and branding this naphtha, adopted by both parties under an agreement, or implied understanding at least, between them, from which this liability to the employe springs, if any exists. The railroad company had been in the habit of receiving and shipping this naphtha as carbon oil under an arrangement with the appellant, with a brand placed on the head of each barrel, "Unsafe for illuminating purposes." There was an implied, if not a positive, duty on the part of both corporations to notify those who handled this substance of its dangerous character, and no arrangement between them, although made in the best of faith, by which dynamite was to be shipped as powder, or naphtha as carbon oil, should protect the appellant from a violation of this duty it owed to the hands or employes whose duty it was to keep it secure, and to handle it when necessary. The freight bill or paper by which this plaintiff was guided showed that it was oil, or carbon oil; and it seems to us the only question for the jury to decide is, "Was the brand on these barrels sufficient notice to the appellant of the dangerous substance within them?" The dangerous quality of naphtha requires more vigilance and care in shipping and handling it than almost any other explosive substance, and as a means of great precaution it would be prudent to give other warning than the mere name of the substance. As an explosive, it is said, the danger is ten times greater than that of gunpowder. It ignites as soon as the blaze is applied to it, and becomes explosive when the vapor from it mingles with the atmosphere in which there happens to be a burning lamp or other light. The conductor might not have known the danger if the word "naphtha" had been placed on these barrels; still it would doubtless have put him on inquiry, and that it was not carbon oil, and at the same time removed all question of negligence from the door of the appellant. The contention by counsel is, that the brand, "Unsafe for illuminating purposes," was intended by the statute as the warning to be given those who handled naphtha. Whether this provision of the statute applies to naphtha, or to the production from petroleum less dangerous and known as "oil" is uncer-

tain, and it is manifest that the car purporting to be loaded with carbon oil from the freight bill did not apprise the appellee of the danger. While the testimony of the agreement between the two corporations as to the manner of shipping should have gone to the jury to show an absence of bad faith on the part of the appellant, still it was its duty, looking to the very great danger connected with the movement of such a substance on trains, to have so branded the barrels as to have informed the conductor of the inflammable character of the substance they contained, and, unless they were so marked as that one exercising ordinary care and prudence with reference to his own personal safety, and whose duty it was to handle the barrels, should have ascertained the danger, the appellant is liable; the converse of the proposition being that, if so branded as that one of ordinary care and prudence should have discovered the danger, the verdict should be for the defendant. While the instructions given by the court below embrace this view of the case, this is the issue to be tried. The appellee had to deal with and deliver this naphtha, and he should have been informed in some way that the barrels contained it.

There are other questions raised as to the admission and rejection of testimony. It was shown that the appellee had a wife and child, over the objections of the appellant. While this fact may not have influenced the finding, it should not have been admitted. The defense offered to prove that the Louisville & Nashville Railroad Company, whose conductor the plaintiff was, had been informed that the words "carbon oil," contained in the bill of lading, meant naphtha. This was refused, and properly, because an employe of even more than ordinary intelligence would not have attached such a meaning to this bill of lading. The court, however, should have admitted the testimony showing that wooden barrels were safe, and that naphtha was ordinarily shipped in that way by prudent business men.

Questions of evidence.

Another error complained of by the appellant is in the trial court permitting the appellee to prove that after this accident both corporations changed the manner of branding the barrels and labelling the cars. There seems to be some diversity of opinion on this point, the weight of authority being opposed to the admission of this character of testimony as a means of showing neglect on the part of the defendant. The Minnesota court, in Morse *v.* Minnesota & St. L. R. Co., 30 Minn. 465, 11 Am. & Eng. R. Cas. 168, said: "We think such a rule puts an unfair interpretation upon human

Proof of, change of method of labelling barrels.

conduct, and virtually holds out an inducement for continued negligence." In Lang *v.* Sanger, 76 Wis. 71, in an action for an injury sustained by reason of defective machinery, the court held that it was erroneous to show that the defects were repaired after the accident. In Terre Haute & I. R. Co. *v.* Clem., 123 Ind. 15, 42 Am. & Eng. R. Cas. 229, it is said: "To declare such evidence competent is to offer an inducement to omit the use of such care as new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents." Other cases determine that such evidence is open to the objection that it raises distinct and independent issues for the consideration of the jury. Nally *v.* Hartford Carpet Co., 51 Conn. 524; Payne *v.* Troy & B. R. Co., 9 Hun (N. Y.) 526; Ely *v.* St. Louis, K. C. & N. R. Co., 77 Mo. 34, 16 Am. & Eng. R. Cas. 342; Reed *v.* New York Cent. R. Co., 45 N. Y. 574.

There is still another question in this case that every court of final resort approaches with reluctance, and that is the one of excessive damages. The verdict in this case is for $25,000—the entire sum claimed in the petition. As said by Mr. Sedgwick in his work on the Measure of Damages: "It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury merely because it exceeds that measure." "There must," says he, "be some mistake of the principles upon which the damages have been estimated, or some improper motives or feelings or bias influencing the jury." Section 1320. It is not for this court to determine the amount the plaintiff is entitled to recover in this character of action, and the verdict in every case for an injury to the person must depend upon the facts and circumstances connected with the commission of the wrong in the particular case, the verdict and judgment in no one case being a criterion by which the court and jury are to be controlled in all cases of a similar character. It was the province of the jury to fix the compensation to which the appellee was entitled, and the court in the instructions given placed properly before them the mode of ascertaining the damages if, from the evidence, the appellee was entitled to recover. The jury reached the conclusion that the appellant was guilty of such an omission of duty as entitled the appellee to a verdict, but was not authorized to increase the amount of recovery by reason of any wilful design on the part of the appellant to injure the appellee. The mode of ascertaining the compensation to which the plaintiff was entitled is found in instruction No. 11, given by the

Excessive damages.

court. The jury was told that, "if they find for the plaintiff, they will give him such damages as they believe from the evidence will fairly compensate him for any suffering, mental or physical, heretofore experienced by him, directly resulting from the injuries complained of, and for any suffering or disability that they may believe from the testimony is reasonably certain he will experience in the future as the direct and necessary result of said injuries, and for any reduction in his power to earn money in the future, if such reduction there be directly resulting from the injury, not exceeding $25,000, claimed in the petition." The appellee at the time of the injury was about thirty years of age; was a vigorous man, and a laborious and useful conductor. His conduct at the time of the burning, as described by the witnesses, deserved admiration and created a sympathy with both judge and jury. His appearance before the jury after the injury with a disfigured face and limbs as described in the testimony, doubtless excited a feeling with every juror, however honest, that drove them to fix the verdict beyond the proper limit of compensation. We are to judge of this question by the light of the cases before us involving verdicts where compensation was the measure of damages, or even verdicts placed upon the wilful neglect of the defendant, and where punitive damages were sought and recovered. It is by comparison with verdict after verdict in this state where more flagrant wrongs were committed and punitive damages claimed, in which juries composed of men, as we have the right to assume, of like intelligence, passion, and feeling, have made their findings for a much less amount; and without enumerating the cases it will be found that $10,000 is the extent to which a verdict has been sustained by this court. Besides, in the case of Railroad Co. *v.* Fox, reported in 11 Bush. 495, where the verdict was for $30,000, and set aside as excessive, most of the cases are referred to. While we do not pretend to adjudge that no verdict would or ought to be sustained for a larger amount than $10,000, we do say that some moderation should be indulged in when arriving at verdicts in this class of cases. As said by the court in Heddles *v.* Chicago & N. W. R. Co., 74 Wis. 239, 39 Am. & Eng. R. Cas. 645, where the injury resulted in the amputation of both legs of the plaintiff, and a verdict for $30,000 was set aside: "No rational being would change places with the injured man for an amount of gold that would fill the rooms of the court, yet no lawyer would contend that such is the legal measure of damages. Courts and juries must deal with such questions in a deliberate and practical sense." In our opinion, the verdict in this case is excessive,

and it is therefore reversed and remanded, with directions to set it aside, and for proceedings consistent with this opinion.

Carriage of Dangerous Freight—Liability for Explosions.—See Walker *v.* Chicago, R. I. & P. R. Co. (Iowa), 30 Am. & Eng. R. Cas. 173, note 176.

BALTIMORE & OHIO R. CO.

v.

KEEDY *et al.*

(*Maryland Court of Appeals, February 4, 1892.*)

Carriers—Injury to Freight by Flood—Negligence of Station Agent.—If a railroad station agent fails to act promptly on an alarming warning which he had of impending danger to a car load of grain standing upon a side track and liable to be reached by a rising flood, and fails to have such car removed to a place of safety before the flood reaches such a height that it is impracticable to make the venture, and the grain is subsequently destroyed by the flood, the railroad company is liable for its loss. The jury were warranted in finding from the evidence in this case that the agent was negligent.

Same—Failure to Remove Grain from Car after Flood.—A car load of grain standing upon a side track was partially injured owing to a flood, the water raising a few inches in the car. After the flood had subsided the door of the car was never opened, although the car remained there eight days, and the grain was substantially destroyed. *Held*, that there was no error in allowing the jury to determine whether, by the exercise of ordinary care, some of the grain might not have been removed and saved, even after the partial submersion.

APPEAL from Washington Circuit Court.

Action for damage to wheat shipped by way of defendant's road. Judgment for plaintiffs, and defendant appeals.

John K. Cowen, *H. H. Keedy* and *J. C. Lane*, for appellant.

M. L. Keedy, for appellees.

IRVING, J.—The appellees shipped 500 bushels of wheat, by the appellant's railroad, to Georgetown. At Antietam station, on the Shenandoah Valley Railroad, a Shenandoah Valley car, No. 118, was loaded, and was taken to Shenandoah junction, where it was delivered to the appellant's agents on the 29th of May, 1889, and was taken by them to Washington junction and placed on a side track. Washington junction being a distributing point for Washington city, cars consigned to Washington remained there until ordered to be brought in. Appellees were notified of the wheat being at Washington junction, and the appellees were aware of the custom of the railroad to keep Washington freight at Washington junction till orders given to bring it in. While this wheat remained at Washington junction, a

Facts.

flood came which submerged the appellant's tracks at that point, and the wheat was substantially destroyed; for it did not bring enough when sold by the road to pay the freight on it. The appellees had refused to receive it, and the appellant had to sell it. This suit was instituted to recover damages for the loss of the wheat occasioned, as the plaintiffs claimed, by the negligence of the appellant's agents.

No question is raised on the ground of delay in transportation in this court; that was settled by a ruling of the circuit court to which there was no exception, and is consequently not involved in this appeal. The sole question in the case is whether there was any evidence in the case legally sufficient to go to the jury to charge the appellant's agents with negligence respecting the wheat, while it was in their care and custody at Washington junction, through which it was ruined by the flood.

The appellant offered two prayers, which raise this question; and, having been rejected by the court, the complaint here is that there was error in that ruling, and in granting the instruction which was given on the behalf of the appellees. If the case ought to have been withdrawn from the jury on appellant's prayers, it would follow, of course, that the instruction which was granted the plaintiffs was also in error.

After careful examination of the proof offered on the side of the appellees, we cannot say there was error. The evidence may not have been of such character as to convince all minds that there was culpable negligence on the part of the appellant's agents; but if there was any evidence from which a jury might honestly reach a conclusion, such as was reached by the jury in the case, then there was no error in allowing the jury to consider it. William F. Harrison testified, on the call of the plaintiffs, (appellees,) that he was, on the 1st of June, 1889, telegraph operator and agent of the appellant at Washington junction; and that Shenandoah Valley car No. 118, loaded with wheat, was brought to Washington junction on Wednesday, May 29, 1889, and was placed on the side track at Washington junction. He also testified that another freight train besides that which brought this car ran daily, except Sunday, from Washington junction to Washington city, D. C., starting from Washington junction; that the side track on which this car was placed was on the far side of the Metropolitan branch from the river, and extended a long distance along the Metropolitan branch, crossing a culvert and running up to the station platform, being connected with the main track by a switch only, at the end towards Washington city; that it is about 525 feet from end of side

Evidence Reviewed.

track at platform to the culvert; that there were 17 cars on the side track, including this car in question, and it was the fifth from the end of the side track, where it connects with the Metropclitan branch, and this car was about 400 feet from the platform at the end of the switch; the fall or decline in the side track from the end of platform to where the car was standing was about 3 feet, and that the water rose, at its highest point, to a depth of 3 feet 3 inches over the side track at its end at the platform, and to the same depth over the Metropolitan branch in front of the station, and that the water rose to a height of 6, 7, or 8 feet over the tracks below the culvert at switch, and did not, at any time, cover the main line at the station building, and back of it; that from the railroad at Washington junction is about 1,000 feet, a flat lying between, and that the water backs up from the river under the culvert, which is an arched culvert made of cut masonry at the end; and he did not know what was back of it, and 10 or 12 feet of fill over it. By another witness appellees proved that the culvert is made entirely of cut masonry, and from 12 to 18 feet of fill over it, and witness said, "It looks like it would hold a mountain." Harrison, the agent, testified that on Saturday morning, June 1st, he saw "the river was rising; that it rose gradually, until about midnight Saturday night, when it reached its highest point; that the engine of the Frederick train was there after it returned from down the track; it left Washington junction at 6.45, and returned in a half or three quarters of an hour; did not try to get Shenandoah Valley car No. 118 or any other out; asked Virtue, the engineer, to take them out, and he said it was too dangerous to cross the culvert; that it was shortly after the train returned he asked Virtue to get cars out, but don't know how long; that on June 5th a freight train left Washington junction,—the freight train that starts at that point for Washington; that Shenandoah Valley car No. 118 was taken from Washington junction on June 8th or 9th; that the water at its highest point rose about 2 feet up the side of the car; that the sills are about 4 inches high; that the said Shenandoah Valley car No. 118 was not opened when upon the side track, and nothing was done to the wheat in said car; that there is another side track between the Metropolitan branch and the river, and a curved track connects the old line with the Metropolitan branch; that the water covered about one-third of the distance of the covered track. On cross-examination, this witness further stated that, to get the cars out, it would have been necessary to cross the culvert five times; "that when the train returned, about 7:30, he was in the office telegraphing,—not telegraph-

ing any place in particular; that he noticed a short time after the train returned that the river was rising rapidly, and then, noticing that the cars on the siding might be in danger from the rising flood, he asked the conductor and engineer of the Frederick train to go down and bring the cars up on high ground, but they declined to do so, alleging there was danger in crossing the culvert, which was then under water, and for fear the water would extinguish the fire in the engine." On the cross-examination of the conductor, who was offered as a witness for appellant, he testified that, when he was asked by the agent to get the cars out, he thought it too unsafe for the attempt to be made to cross the culvert, for it was then under water, and would put out the fire in the engine. He testified that some time after the return of the train to Washington junction he walked about half way to the culvert, and noticed the side track next to the river undermined, and the water was striking against the bed of the railroad, under the end of the ties, and was not up to the rails at culvert; and Virtue, the engineer, on cross-examination by plaintiffs testified that when he was asked to get the cars out, everything was submerged, and there was then three feet of water at culvert.

How long after the Frederick train had come back it was that the station agent asked the conductor and engineer to get the cars out does not appear. The agent says "shortly after," and the conductor says "a short time." These are indefinite expressions, and may mean a longer or shorter time, according to the subject-matter with reference to which they are used, or according to the particular ideas of the person using them. As to what the conductor meant we have some means of deciding. He says, in another part of his testimony, it was "between eight and nine o'clock in the morning, and not long after the train had come back." This witness had stated that at 6:45 he had started with his train for Washington, and having gone two or three miles on his way, finding the water over the track too deep to be safe to proceed, had backed train to the junction across the culvert, but did not notice the condition of things at the culvert at that time. When the train got back to the junction the agent testifies that it was about half past 7 o'clock. The conductor, too, says it was between 8 and 9 o'clock when he was asked to take cars out. Putting it midway between those hours there was a space of two hours between the return of the train to the junction and the request to get the cars out. Now, the agent knew the water was rising. He knew it was doing so alarmingly, and that this train had been compelled to come back because the tracks beyond the

culvert were dangerously submerged. The culvert was not yet submerged, however, for the conductor looked "some time after,"—another indefinite expression, and saw that at culvert it was not up to the track, but was at the bottom of the ties. A jury might with such evidence before them, think that the agent was derelict, and not prompt enough in looking after the safety of the cars; and they might have reasonably found that, had he been more vigilant, this car might have been removed to a place beyond the reach of the water, for the testimony showed there were points of safety. Exactly how soon the agent knew of the approaching flood does not appear. He says he noticed in the morning the river was "rising gradually." The jury might reasonably find that it was as early as 7 o'clock, for the train left at 6:45, and he knew it was driven back by the water covering the tracks beyond the culvert. It, with its passenger-cars and passengers, reached the station again as early as half past 7. The culvert was passed in safety with these passengers in the cars. It was some time after this, the conductor said, when he looked and saw the water was striking under the ties on which the rails were laid, and was not over the road and rails at the culvert. The agent knew, according to this testimony, it was rising gradually, and it was rapidly doing so. Though it did not come with a rush, he knew the rising was continuous, and that, though the rise was "gradual," it was fast. It was also in evidence before the jury that the rise continued till midnight, when the highest point was reached. Taking the height attained, and the hours occupied in doing so, the rise was an average of six inches per hour.

With such evidence, might not the jury, exercising their judgment honestly, have reached a conclusion that, if the agent had acted promptly on the alarming warning which he had of impending danger, and called on the conductor and engineer sooner than he did to remove the cars to a place of safety, that it might have been done before the condition of things was such that when it was made those officers thought it impracticable to venture, if not impossible to accomplish? We cannot say a fair-minded and honest jury might not so believe and find. If such jury should think that, under such circumstances, an ordinarily prudent man would, on the same evidence of danger before him which this agent had, have acted more promptly, and with more discretion and judgment than was exercised by this agent, and that by such action could have avoided the damage to the wheat, then certainly we think they would be justified in finding as they did. All that the court was called upon to say was

Negligence of agent in failing to remove car.

whether the evidence was legally sufficient to justify a finding for the plaintiff. It was for the jury to find by the verdict whether the evidence was sufficient, in fact, to establish negligence on the part of the appellant's agents. What will amount to ordinary care, or the want of it, in any given case, "must be determined by the standard of common prudence and experience, in view of the special circumstances" of any particular case. What may be ordinary care, in view of one state of facts, may fall short of it under another state of facts. Hence, as was said by this court in Fitzpatrick's Case, 35 Md. 32: "A jury of intelligence and experience, from their knowledge of the usual and ordinary conduct of their fellow men, are the best judges of such a question." Jones *v.* Jones, 45 Md. 154; Kagel *v.* Totten, 59 Md. 454; Clarke *v.* Dederick, 31 Md. 148; Baltimore & O. R. Co. *v.* State, 29 Md. 420; Baltimore & O. R. Co. *v.* State, *Id.* 262, may be cited in further support of this ruling.

What we have said disposes of the question whether the appellant's prayers, based on the contention that there was no legally sufficient evidence to take the case to the jury, were correct. The court rejected those propositions, and in doing so we think was right.

It only remains to consider if there was any infirmity in the instructions actually granted at the instance of the appellees and of the court's own motion. Counsel directed their arguments altogether to the question of legal sufficiency of evidence before the jury to justify a finding of negligence on the part of appellant's agents and employes, and no special objection to the instructions given the jury has been noted. So we suppose none was intended to be made to the form or substance of the instruction, if there was evidence enough to take the case to the jury. On the question whether there was evidence legally sufficient to go to the jury to show negligence in not removing the car to a safer place, we said there was; and on that evidence we think the case was properly committed to the jury on the instructions given. After reciting the evidence respecting the shipping of the wheat by appellant's road, and its being brought to Washington junction, the instruction proceeds to state that, if while the wheat "was standing upon said side track, if said defendant, its agents or employes, had warning of the approaching flood, whereby the wheat was damaged, and further find that said defendant, its agents or employes, did not exercise ordinary skill, prudence, and foresight to save said car of wheat from being injured and damaged by the flood; and further find that, by reason of said failure upon the part of said defend-

Failure to save part of grain after flood.

ant, its agents or employes, to exercise said ordinary care, diligence, prudence and foresight, said car of wheat was caught and submerged by the flood, and injured and damaged on June 1st,—then the plaintiffs are entitled to recover to the extent of the injury sustained." To this language of the plaintiffs' prayer the court added that if they find "that such freshet was the immediate and direct cause of the damage to the wheat, although there may have been undue and unnecessary delay by the defendant in the transportation of the said wheat to its place of destination previous to the occurrence of such damage thereto by the freshet, the plaintiffs are not entitled, unless the jury believe from the evidence before them that the defendant could, by reasonable exertion and diligence in the use of the means at its command, after discovering the impending danger to the wheat from the rising flood, have saved the wheat from injury by the water by moving the car to a place of safety, or, by the reasonable use of any other means in its power, have prevented such damage, but that the burden of proof of the want of diligence and care in this respect on the part of the defendant rests with the plaintiff." This addition to the plaintiffs' prayer by the court, *mero motu*, was certainly in the interest of the defendant, being designed to prevent any possible mistake on the part of the jury as to the effect of the evidence. The latter part or clause of the court's superadded instruction was evidently supposed by counsel to refer to the possibility of saving the wheat, or a part of it, after the flood had come and wet the wheat in part, and the counsel for appellant, as to that, has said it was not necessary to discuss that, "for there was no evidence to show that any part of the wheat could have been saved by anything the appellant could have done after the freshet." We see no error in allowing the jury to consider that aspect of the case also. The wheat was only partially wet in the beginning. The evidence established it to be 5 feet deep in the ends of the car, and sloping somewhat towards the center. The sills were proven to be 4 inches thick, and floor, say, 1 inch, which would make 5 inches to cover from the 2 feet, which was the distance witness said the water came up to the side of the car. Making this deduction, the jury would find only 19 inches of water in the wheat, leaving 31 inches of wheat above the reach of the water. The evidence showed that the door of the car was never opened while the car remained at the junction. There certainly was no error in allowing the jury, on that state of facts, to determine from their practical knowledge whether, by the exercise of ordinary diligence and care, some of that wheat might not have been removed and saved from total

destruction; and whether an ordinarily prudent man would not, and could not, with reasonable effort, under like circumstances, have saved a large part of that wheat, even after the partial submerging. Finding no error, the judgment will be affirmed.

NEW YORK, LAKE ERIE & WESTERN R. Co.

v.

ATLANTIC REFINING Co.

(*New York Court of Appeals, January 30, 1892.*)

Carriers—Negligence of Consignee in Unloading Lumber—Liability for Derailing Train.—A railroad company owes no duty to a person to whom it has delivered a car load of lumber upon a siding adjacent to the main track, to watch and take care of the car and its contents; and if the owner of such lumber, after unloading a part of it, leaves it standing over night, without replacing the fastenings to hold it on the car, whereby such lumber is blown upon the main track and causes a train to be derailed, he is liable in damages. In such case, the railroad company is not guilty of contributory negligence in acting upon the assumption that the defendant would perform his duty in properly securing the lumber.

APPEAL from Supreme Court, General Term, first department.

The material facts of this case are substantially as follows: On the night of October 31, 1882, the plaintiff's west-bound freight train left Hornellsville about 11 o'clock for Wellsville, a station about 26 miles further west. About 3 miles east of Wellsville there was a side track known as "Dyke's Switch." As the train, going at the rate of 40 or 45 miles an hour upon the main track, approached this side track, the head-light of the locomotive illuminated the track for some distance; and the engineer, Chapman, perceived an obstruction upon the track which looked to him like a pile of lumber, about 250 feet ahead. He immediately applied the air-brakes and reversed his engine, but was unable to stop the train before it struck the lumber. He was badly injured, the train was derailed, and the locomotive and cars broken and damaged. It was then ascertained that the lumber had fallen from a car which had been delivered to the defendant upon the siding, and which it had partly unloaded, and then left overnight standing on the siding adjacent to the main track, without replacing the fastenings which it had removed in order to unload lumber. The car had been transported from Olean, and delivered to the defendant about 4 o'clock in the afternoon at Dyke's Switch, where it was engaged in building some oil-tanks. In order to keep the lumber safely on the

car, there were stakes set in sockets along the sides of the car, and these stakes were supported by cross-pieces or braces, nailed to the tops of the stakes, extending across the top of the lumber, thus preventing the stakes from being pushed out of place or broken by the weight of the lumber. The defendant's agent, in order to unload the lumber, knocked off these cross-pieces, took out the stakes on the side of the car furthest away from the main track, and removed from the car several wagon-loads of lumber, not unloading it evenly from the top, but taking it mostly from the side of the car away from the main track, and taking out a number of pieces from the middle or under part of the load, thus leaving the lumber on the car in a high narrow pile next to the plaintiff's main track, without putting back the cross-pieces which formed the chief support of the stakes. The defendant's agents went away, and left the car overnight. During the night, between 8 and 11 o'clock, there was a storm of wind and rain; and before the plaintiff's train reached the spot the lumber fell, or was blown, from the car upon the main track, and the accident was thus occasioned. The plaintiff brought this action to recover the damages it sustained from the accident, alleging that the lumber came upon its track through the negligence of the defendant. The plaintiff recovered a verdict at the circuit, and from the judgment entered thereon the defendant appealed to the general term, where the judgment was reversed and a new trial granted, and then the plaintiff appealed to this court.

Charles Steele, for appellant.

John Brooks Leavitt, for respondent.

EARL, J.—Chapman, the engineer upon the plaintiff's engine at the time of the accident, was severely injured and he brought an action against the defendant to recover for his injuries. His recovery was sustained in the general term and in this court. 38 Hun (N. Y.) 637, 108 N. Y. 638. In that action it was finally determined in this court that there was sufficient evidence of the defendant's negligence to uphold the plaintiff's recovery. Upon the trial of the action which resulted in the judgment now under review, the plaintiff called no witnesses, but by consent read the evidence given on behalf of the engineer in his action, and most of the defendant's evidence was also read as it was given in that action. Thus the evidence given on the trial of this action is substantially the same as that given upon the trial of that action. Without, therefore, further examining the evidence, we may properly hold that the negligence of the defendant was sufficiently established, and pro-

Negligence of defendant.

ceed to the main contention now made on its behalf, that there was contributory negligence on the part of the plaintiff which forbids its recovery. It was upon this ground that the judgment entered upon the verdict was reversed by the general term. This carload of lumber was transported by the plaintiff, and placed upon the side track for the defendant, and there it received the delivery of the lumber. At the time of its delivery it was in a safe condition on the car, properly loaded and fastened. If the defendant had removed all the lumber from the car on that day, as it undoubtedly could, no accident would have happened; and if, as the jury must have found, after removing a part of the lumber, it had left what remained on the car properly loaded and properly fastened, no accident would have happened. But because of negligence attributable to it, and solely because of that, the lumber, in some way and from some cause, fell from the car upon the main track, and thus caused the accident. The plaintiff owed no duty to the defendant to unload the car, or to superintend the unloading of the car, or to watch and take care of the car during the night of the accident. It had no watchman at that place, and owed no duty to the defendant to keep one there. It was not bound, as between it and the defendant, to anticipate any danger from the lumber upon that car after it had been delivered to the defendant. It had the right to assume that the defendant would discharge its duty, and that it would not negligently place the lumber upon the plaintiff's track, or permit it to be placed or come there. Therefore it had the right to run its train on the assumption that the track at that point was clear and safe; and the defendant, through whose negligence the accident was caused, has no right whatever to charge the plaintiff with negligence. We have not here an inquiry about the duty which the plaintiff as a carrier of passengers owes to its passengers or to the employes upon its train. As to them it is under the duty of active vigilance to guard them from danger. But as to a stranger with whom it has no relations, and to whom it owes no duty, it is not bound to active vigilance to guard him from damage, or in any way to avoid the consequences of his negligence. If the plaintiff had been aware of the defendant's negligence, or had known that the lumber was upon the track, or that it was likely to be there, or its engineer had seen it in time to avoid the accident, then the duty would have devolved upon it to guard against the danger by active vigilance on its part. But having no knowledge or notice of the danger, it owed no duty whatever to act upon the assumption that the danger might exist, and

Contributory negligence of railroad company.

thus to take affirmative measures to protect itself against any wrong which the defendant might inflict upon it. Any citizen, in the prosecution of his own business, may everywhere act upon the assumption that no other citizen will by misfeasance cause him an injury, unless there is something in the circumstances of the case which casts upon him the duty of active vigilance for his own safety. The trial judge, therefore, did not err in holding that there was no evidence in this case of contributory negligence on the part of the plaintiff which shielded this defendant from liability for the consequences of the accident. The plaintiff was not bound to keep a watchman at this side track; hence the trial judge committed no error in refusing to admit the defendant's proof that no watchman was kept there.

Neither did the trial judge err in refusing to allow the defendant to prove that the car which the plaintiff furnished to it for transporting the lumber was not a lumber-car, boarded up part of the way around the sides, but a flat-car. The lumber was transferred in safety to this side track, and when delivered was safely fastened on the car, and it fell from the car, not from any imperfection in the car, but from the careless manner in which the lumber was left upon the car after a portion of it had been removed by the defendant.

Instructions given and refused.

The following requests to charge made on the part of the defendant were properly refused: "If you find that the accident occurred through the negligent omission to foresee that the lumber was not left in a condition to withstand a storm, then the plaintiff is equally negligent." "If you find that the accident occurred through any negligent omission of plaintiff to have a track-walker,—a person in charge of the tracks,—the verdict should be for defendant." "Plaintiff was bound to keep its tracks in a safe condition." "Plaintiff was bound to see that this car was in a safe condition over-night." "Plaintiff had the custody of this car overnight." "If you find that this car was overnight in the custody of the railroad company, the defendant is not liable." And the following portion of the judge's charge which is complained of by the defendant, and which the general term held to embody error, we think contains an accurate statement of the law, applicable to this case: "I have already stated to you that the negligence upon the part of the railroad company in not having a watchman upon the track, if you please, or in running its engine at a high rate of speed, or anything of that kind, has nothing to do with the question of absolving these defendants from their liability. The plaintiffs were not bound to assume that these defendants were going to put their lumber upon the track, and

therefore have a watchman for the purpose of seeing they kept it off. The law does not require a railroad company, or anybody else, to provide a guard to keep trespassers off their property, or to keep persons from putting obstructions upon their tracks. If persons do put obstructions upon the tracks of a railroad company they are responsible for it, under all circumstances. But, if the engineer saw this obstruction in time to have stopped that train, then he was bound to use all reasonable efforts for the purpose of so stopping it. If, however, he did not see it, and ran into it, no matter whether he ought to have seen it or ought not to have seen it, is immaterial, so far as these defendants are concerned. His negligence in not seeing it would not absolve them from the liability which otherwise would have existed. If he willfully ran into the danger, of course there would be no right of action upon the part of the plaintiffs here." In this portion of the charge the judge evidently did not intend to say that the defendant was guilty of a trespass, or of willfully placing this lumber upon the track. Assuming that the lumber came upon the plaintiff's track through the negligence of the defendant, the rules of law stated by the trial judge are precisely applicable. We are therefore of opinion that the order of the general term should be reversed, and the judgment entered upon the verdict affirmed, with costs. All concur.

HALE

v.

BONNER *et al.*

(Texas Supreme Court, October 30, 1891.)

Carriers—Delay in Delivering Corpse—Damages for Mental Suffering.—A widow may recover damages for mental suffering caused by the negligence of a railroad company in failing to deliver promptly the body of her deceased husband, which it had undertaken to transport.

APPEAL from Gregg District Court.
Todd & Rowell and *L. S. Schluter*, for appellant.
Gould & Camp, for appellees.

GAINES, J.—The appellant brought this suit in the court below to recover of the appellees, as receivers of the International Great Northern Railroad Company, damages for a failure to deliver promptly the body of her deceased husband under a contract with her for its car- **Case stated.**

riage from San Antonio to Jefferson. She alleged in her petition, in substance, that her husband died at Boerne; that at the time they were sojourning at that place on account of his health, but that their home was in Jefferson; that she caused his body to be inclosed in a metallic casket, and conveyed to San Antonio, where she immediately entered into contract with the agent of defendants for its carriage to Jefferson, by paying for and procuring a first-class passenger ticket to that place, known and marked as a "corpse" ticket; and that at the same time she procured tickets for herself and attendants over the same line to the same place. It was also alleged that on the 12th day of the same month the body was delivered to the agents of the defendants, and placed on board the train; that she took the same train, and arrived at an early hour the next morning at the depot at Jefferson, where her relatives and many friends were in waiting to accompany her dead husband to her home; but that, to her great mortification and distress of mind, she then ascertained that the casket containing the body had not arrived. It was further averred that, as she subsequently ascertained, the body, instead of having been sent forward by the train upon which she was carried, as should have been done, was, through the negligence of the defendants' agents or servants, placed in a box-car, and left upon the side track at Palestine, an intermediate station, that did not reach Jefferson until the 14th day of the month; and that on account of its advanced state of decomposition, resulting from the delay, "it was with great difficulty, and much additional pain and distress of mind, that her and his friends could decently inter the said remains." The petition claims damages for mental distress, and prayed also for a recovery of exemplary damages. A demurrer to the petition was sustained by the court, and, the plaintiff having declined to amend, her suit was dismissed.

She here complains of the ruling of the court upon the demurrer and asks a reversal of the judgment. We are unable to distinguish in principle this case from those in which recoveries against telegraph companies have been allowed for failure to deliver with promptness messages announcing the death or mortal illness of near relatives. Such cases are exceptional. As a rule, mental suffering is not an element of the damages which are recoverable for breach of a contract, or, in an action for a tort, founded upon a right growing out of a contract. Ordinarily, the object of sending a telegraphic message announcing the death or sickness of a relative is to afford the person to be benefited the solace that may result

Widow entitled to damages for mental suffering.

from being present during the last illness of the relative, or attending his obsequies, as the case may be. The direct result of the failure to perform the duty of delivering the message being to deprive the person addressed of this solace, and to cause distress of mind, it is not unreasonable that he should have his compensation therefor. It is upon this principle, in my own opinion, that the decisions of this court in the telegraphic cases are to be maintained. The same principle applies in this case. But, however that may be, we see no valid reason why, if a recovery can be had for mental suffering resulting from the failure to deliver a telegraph message announcing the death, like damages should be here denied. In the case of Western Union Telegraph Co. *v.* Simpson, 73 Tex. 422, the resulting injury was somewhat similar to that in the present case. But it is insisted that the mental suffering for which a recovery was sustained in that case was the immediate result of the delay in securing the money which the company had contracted to deliver. Some disagreeable mental emotion is the ordinary result of the failure to pay or deliver money according to promise. But the measure of damages for the breach of the contract is the money to be paid or delivered, with the interest. It was the fact that the plaintiff was detained in a distant state, watching over the body of her deceased husband, which sustained the recovery in that case. The judgment is reversed, and the cause remanded.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

v.

COMMERCIAL UNION INSURANCE CO. *et al.*

(*139 United States, 223.*)

Carriers—Agreement to Transport Cotton—Delay—Destruction by Fire.—A railroad company which agrees with a compress company to transport to the compress all cotton received at a certain place, is not liable to the owners or insurers of such cotton for the destruction by fire of a lot of cotton which had accumulated during the delay of the railroad company to furnish transportation, such delay not being the direct and proximate cause of the loss by fire.

Same—Effect of Exchange of Bills of Lading for Receipts of Compress Company.—The fact that a railroad company issues through bills of lading in exchange for the receipts of a compress company for cotton stored in the sheds of the compress company, or in the street, does not render it liable for a nuisance resulting from the manner in which the cotton is kept by the compress company; neither does it, by so issuing bills of lading, take possession of the cotton, nor make the compress company its agent to hold it.

Rights of Insurer by Way of Subrogation.—The right of an insurer, upon paying for a total loss of the goods insured by him, to recover over against a third person responsible for the loss, is derived by way of subrogation from the assured, and can be enforced in his right only; if the assured has no right of action, none passes to the insurer.

Foreign Insurance Company—Laws Governing.—In Arkansas, foreign insurance companies are governed by the act of March 26, 1887, which requires them to file with the State Auditor stipulations for the service of process upon them, and not by the Act of April 4, 1887, requiring foreign corporations to file such stipulations with the secretary of state.

IN error to the Circuit Court of the United States for the eastern district of Arkansas.

This was an action at law brought September 21, 1889, against a railroad corporation of Arkansas, by three insurance companies, corporations of other states or of England, to recover the sum of $13,000, which the plaintiffs had insured on 340 bales of cotton to Samuel O. Smith & Co., the owners thereof, and had paid to them upon a loss of the cotton by fire, in consequence (as the complaint alleged) of the defendant's negligence. A plea of non-joinder of Samuel O. Smith & Co. was filed and overruled, and the defendant answered to the merits. The evidence introduced to the plaintiffs at the trial tended to prove the following facts: Before September 20, 1887, the defendant (whose railway extended from Little Rock in Arkansas, across the Arkansas River, to Argenta and beyond) had made an oral contract with the Union Compress Company (which was engaged in compressing bales of cotton for transportation) to receive all cotton in bales that might be brought by its owners to the sheds of the compress company at the foot of Main street, in Little Rock, and to transport it over its railroad across the Arkansas River, to the compress of that company in Argenta, a distance of a mile and a half, for two dollars a car-load. Immediately in front of the sheds was a platform along the railway track, and habitually used by the compress company for the purpose of loading cotton on the cars. While the contract was in force, 340 bales of uncompressed cotton were placed by Samuel O. Smith & Co. at the sheds, and in the care and custody of the compress company, which gave them a receipt stating that the cotton was "received by the Union Compress Company for compression; storage after ten days will be charged; not responsible for any loss by fire;" and afterwards, by reason of an accumulation of cotton in the sheds, owing to the neglect of the defendant railway company, though often requested by the compress company, to furnish transportation according to the contract between them, the compress company piled and kept these bales and much more other cotton in the street adjoin-

ing. The defendant railway company, as a matter of convenience to all parties, and at the request of owners of cotton, often gave them in exchange for the receipts of the compress company, and before the cotton was put on the cars by the latter, through bills of lading to its ultimate destination after being compressed; and, after so issuing such bills of lading, gave written notice to the compress company, stating the fact of their issue, and directing the compress company to ship the cotton on the railway by a certain route and to a certain address; and the compress company, on receiving such notice, insured the cotton in behalf of the railway company, and put the cotton on the cars, compressing it at Argenta for the convenience of further transportation. The railway company gave such bills of lading for most of the other cotton; but it gave no bill of lading for the 340 bales in question; and unless through its dealings with the compress company as aforesaid, it in fact exercised no custody or control of the sheds and the street, or of any of the cotton, before it was put on the cars by the compress company. The plaintiffs, on October 17 and 19 and November 11, 1887, by their agents at Little Rock, without having complied with the provisions of the statute of Arkansas of April 4, 1887, chap. 135, entitled "An act to prescribe the conditions upon which foreign corporations may do business in this state," severally issued policies of insurance to Smith & Co., amounting in all to $17,000, on the 340 bales of cotton, describing it as in the sheds, on the platform, and in the street. The value of these bales was $18,179. On November 14, 1887, the cotton piled in the street, including the 340 bales, was wholly destroyed by fire from an unknown cause, and the plaintiffs afterwards paid Smith & Co. the sums insured.

The defendant requested the court to give, among others, the following instructions to the jury: "(5) If at the time said cotton was burned, on November 14, 1887, at the foot of Main street, it was in the custody, possession and control of the Union Compress Company, and upon premises over which the defendant railway company had no control, and if it owed no duty as a common carrier in relation to said cotton, and if, while in such custody and control, the cotton was set on fire by the act of some unknown person, with whom the defendant had no connection, and of whom it had no knowledge, then the defendant railroad company cannot be held liable in this action." "(11) If the jury find from the evidence that there was no contract or arrangement between the railway company and the compress company which contemplated the depositing of cotton in and upon Main street, but that the placing of cotton there, and the permitting of it

to be placed there, was the sole act of the compress company, and the owners of the cotton, and that the railway company had no control over the premises where the cotton was stored, then the defendant is not liable in this suit, even though the depositing of cotton in and upon Main street constituted a public nuisance. (12) In order to make the defendant liable for the placing of cotton in and upon Main street, the jury must find from the evidence that the defendant was a party to the arrangement or agreement by which the cotton was deposited in and upon said street; and the mere fact that an arrangement existed by which the defendant issued bills of lading for cotton deposited in the compress warehouses, and had agreed to handle the same from said warehouses to Argenta, this fact of itself will not make the defendant liable for an injury which would not have happened except for the placing of cotton on the street itself." "(14) If the jury find that the plaintiffs, at the time of the issue of the policies of insurance introduced in evidence in this cause, had not and have never up to this date, filed in the office of the secretary of state certificates designating an agent upon whom service of summons and other process may be made, or certificates stating the principal place of business of each plaintiff in this state, as required by the statute of the state, it cannot maintain this action." The court refused to give each of these instructions; and instructed the jury that, by the agreement between the defendant and the compress company, the defendant made the cotton sheds of that company a receiving station for cotton to be sent by any one from Little Rock to the compress of that company at Argenta, and "it was the duty of said defendant to transport the cotton, thus received at said cotton sheds for shipment, promptly to Argenta; and that if the defendant failed to do so, and by reason of the continued reception of cotton at said sheds, and the continued giving of bills of lading therefor as often as demanded by shippers thereof down to the day of the fire, cotton was suffered to accumulate at said sheds and on Main street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then the defendant was guilty of aiding in the creation and maintenance of a public nuisance, and is liable for the loss mentioned in the complaint;" and that if the jury found that "the defendant was guilty of aiding in erecting, maintaining, or continuing said nuisance as aforesaid, and the cotton mentioned in said complaint was destroyed by reason thereof," and was at the time of the loss insured against fire by the plaintiffs, and the plaintiffs since that time, and before bringing this suit, paid the amount of

the loss to the assured, the jury should return a verdict for the plaintiffs for the sums so paid, with interest. The grounds of the rulings and instructions of the circuit court appear in its opinion delivered in a similar action brought against the same railway company by another insurance company, and reported as Marine Ins. Co. *v.* St. Louis, I. M. & S. R. Co., 41 Fed. Rep., 463; 43 Am. & Eng. R. Cas., 79. The defendant duly excepted to the refusal to give each of the instructions requested, and to so much of the instructions given as is above stated; and after verdict and judgment for the plaintiffs, sued out this writ of error.

John F. Dillon for plaintiff in error.

E. M. Rose, *E. W. Kimball* and *G. W. Rose* for defendants in error.

GRAY, J.—At the very foundation of this action lies the objection of the defendant that the plaintiffs could not acquire or enforce any rights under or by virtue of the contracts of insurance made by them within the state of Arkansas because they had not complied with the statute of Arkansas of April 4, 1887, chap. 135, entitled "An act to prescribe the conditions upon which foreign corporations may do business in this state," and containing the following provisions: "Section 1. Before any foreign corporation shall begin to carry on business in this state, it shall, by its certificate under the hand of the president and seal of such company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of this state, upon whom service, summons and other process may be made. Such certificate shall also state the principal place of business of such corporations in this state. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this state. Sec. 2. If any such foreign corporation shall fail to comply with the provisions of the foregoing section, all its contracts with citizens of this state shall be void as to the corporation, and no court of this state shall enforce the same in favor of the corporation." But a comparison of that statute with other legislation of the state of Arkansas clearly shows that it was not intended to include foreign insurance companies. That statute was the earliest one of the kind in Arkansas, concerning foreign corporations generally. But a counterpart of that statute, (embodied in Mansf. Dig. chap. 83,) concerning foreign insurance companies, had for years been in force, which, after establishing an "insurance bureau" in the office of the auditor of state, and making it the duty of the auditor to see that all the laws of the state respecting insurance companies

Law governing foreign insurance companies.

were faithfully executed; declaring it to be unlawful for any person, company, or corporation to solicit or make any contract of insurance within the state without complying with the provisions of this act; and requiring every insurance company or association, domestic or foreign, doing business in the state to transmit to the auditor, annually, or oftener if requested, statements of its condition, business, and receipts,—provided as follows: "Sec, 3831, No person shall act as agent or solicitor in this state of any insurance company of another state or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association by the auditor a certificate of authority, showing that the company or association is authorized to transact business in this state." "Sec. 3834. No insurance company not of this state, nor its agents, shall do business in this state, until it has filed with the auditor of this state, a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this state." This statute also provided, by §§ 3832, 3833, that such companies should report to the auditor annually the amount of premiums received within the state, and certify to the auditor the names of "the agents appointed by them to solicit risks, issue policies, or receive applications in this state," and that no such agent should transact business until he had procured a certificate from the auditor; and, by § 3835, that any foreign insurance company, or any person or corporation transacting business for it, without being authorized under this act, should be fined $500 a month, and be prohibited from doing business in the state until the fines were paid. On March 26, 1887, only nine days before the passage of the statute concerning foreign corporations, on which the defendant relies, the same legislature passed an act "for the better regulation of the business of insurance in this state," (St. 1887, chap. 84,) containing the following provisions: "Sec. 3. Before any corporation or company organized under the laws of any other state shall be permitted to do business in this state, they shall, in addition to filing the bond required in section one of this act, be required to file with the auditor of state a statement of the commissioner of insurance of the state under whose laws they are organized, as to their condition, responsibility," etc,; "and, if there be no such commissioner, the auditor may require said company

to exhibit to him a statement of their financial condition, responsibility," etc,; "and, if it appears that said company is a responsible company, said auditor shall issue a certificate for them, as hereinafter provided. Sec. 4. When any insurance company shall have complied with all the provisions of this act, it shall be the duty of the auditor of state to issue to said company a certificate to that effect, which shall entitle them to do business in this state; and if any person shall attempt to solicit or transact any business for and in the name of any such company, which company has not complied in all repects with the requirements of this act, he shall be guilty of a misdemeanor," and be fined not exceeding $500.

It thus appears that the state of Arkansas had established and maintained a distinct system with regard to foreign insurance companies, under the superintendence of the state auditor, by which every such company was required to file with the auditor a stipulation for the service of process upon it, as well as to make full returns of its condition and business to that officer, to report to him the names of all its agents within the state, and to receive from him certificates of authority for itself and for each of its agents; evidently contemplating that a foreign insurance company would have no principal place of business within the state, but would transact its business in the usual manner through agents at different places. Such being the settled policy of the state with regard to foreign insurance companies, they cannot reasonably be held to be governed by the act concerning foreign corporations generally, which required a certificate to be filed with the secretary of state, designating an agent upon whom service might be made, and stating the principal place of business of the corporation within the state. To construe that act as including foreign insurance companies would require the drawing of one of two equally improbable inferences,—either that the only stipulations of such companies for service of process upon them should be filed in a different public office from that in which all other returns and documents relating to such corporations are preserved, or else that their stipulations for such service must be filed both with the auditor and with the secretary of state. For these reasons we are satisfied that the omission of the plaintiffs to file in the office of the secretary of state the certificates required by the statute of Arkansas of April 4, 1887, chap. 135, was no bar to this action, and that the fourteenth instruction requested was rightly refused.

It is not contended that the plaintiff's contracts were void for want of compliance with the provisions of the statutes of Arkansas concerning foreign insurance companies, and it does

not even appear whether they had or had not complied with them. The validity of the contracts of insurance being established, there can be no doubt of the nature and extent of the rights acquired by the plaintffs under those contracts. In fire insurance as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation, but the rights of the assured; and if the assured has no right of action, none passes to the insurer. Hall *v.* Nashville & C. R. Co., 13 Wall, U. S. 367, 370, 372; Mobile & M. R. *v.* Jurey. 111 U. S. 584, 593, 16 Am. & Eng. R. Cas. 132,; Phœnix Ins. Co. *v.* Erie & W. Transp. Co., 117 U. S. 312, 321, 11 Am. & Eng. Corp. Cas. 597; Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 462, 37 Am. & Eng. R. Cas. 681; Connecticut Fire Ins. Co. *v.* Erie R. Co., 73 N. Y. 399; Platt *v.* Richmond, Y. R. & C. R. Co., 108 N. Y. 358, 32 Am. & Eng. R. Cas. 517.

Right of insurer by subrogation.

The principal question in the case therefore, is, whether Samuel O. Smith & Co., the owners of the 340 bales of cotton, had any right of action against the defendant railway company for the loss of this cotton by fire. As sufficiently appears by the bill of exceptions in this case, and more fully by an opinion delivered by the court below in the similar case of Marine Ins. Co. *v.* St. Louis, I. M. & S. R. Co., 41 Fed. Rep. 643, 651, 652; 43 Am. & Eng. R. Cas. 79, the rulings and instructions under which the plaintiffs obtained a verdict proceeded upon the theory that, if the cotton had been suffered to accumulate in the sheds and in the street until, by reason of the danger of its taking fire, it endangered the property of the plaintiffs and others in the immediate vicinity, it was a public nuisance, and the defendant, as matter of law, was guilty of aiding in creating and maintaining that nuisance, and responsible for its consequences, upon three grounds: (1) That the defendant had not removed the cotton as soon as delivered by the owners to the compress company, as it was authorized and

Question presented.

required to do by its contract with that company; (2) that the defendant must be conclusively presumed to have been in possession of so much of the cotton as it had issued bills of lading for; (3) that the defendant had made the cotton sheds a receiving station for its railroad, and the compress company its agent to receive and hold the cotton.

The leading facts which the evidence introduced by the plaintiffs at the trial tended to prove were as follows: The defendant railway company had made an oral agreement with the compress company to receive and transport all cotton in bales brought by its owners to the sheds of the compress company, and broke this agreement by neglecting to furnish transportation. For most of the cotton delivered by its owners to the compress company, the railway had issued bills of lading, but it had issued none for the 340 bales of Smith & Co. By reason of this neglect of the railway company to furnish transportation, and the consequent accumulation of cotton in the sheds of the compress company, a large mass of cotton delivered by its owners to the compress company, including the 340 bales, was piled and kept by that company in a public street adjoining its sheds, and, while there, was destroyed by fire from an unknown cause. So far as concerned the 340 bales, the only contract of the railway company was with the compress company, and was to receive and transport the cotton.

Facts reviewed.

The neglect of the railway company to furnish sufficient transportation may have been a breach of that contract, for which the compress company might maintain an action; but it created no liability, in contract or in tort, to the owners or insurers of the cotton, or to any other person. This cotton, certainly, was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it, had no custody or control of it, and no possession of it, actual or constructive; and had no hand in placing or keeping it where it was. The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and

Defendant liable for delay in furnishing transportation.

authority, that neglect was not the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers. Memphis & C. R. Co. *v.* Reeves, 10 Wall. (U. S.), 176; Morrison *v.* Davis, 20 Pa. St. 171; Denny *v.* New York Cent. R. Co., 13 Gray (Mass.) 481; Hoadley *v.* Northern Transportation Co., 115 Mass., 304; Dubuque Wood & C. Asso. *v.* Dubuque, 30 Iowa, 176; Daniels *v.* Ballentine, 23 Ohio St. 532.

The next question is how far the railway company's liability in this action is affected by the fact that it had issued bills of lading for other cotton forming part of the same mass accumulated in the street. The course of business was this: The compress company received the cotton from its owners, gave them warehouse receipts for it, and placed and kept it, as it saw fit, in its sheds or in the adjoining street. The railway company, whenever the owners requested, gave them bills of lading in exchange for the receipts of the compress company. After doing this the railway company gave notice to the compress company, and directed that company to put the cotton on the cars, addressed accordingly; and the compress company then insured the cotton in behalf of the railway company, and put the cotton on the cars. There is nothing else in the case which has any tendency to show that the railway company had or exercised any control or custody of the cotton, or of the place where it was kept by the compress company, before it was put upon the cars by that company. The railway company evidently neither considered itself, nor was considered by the compress company, as having assumed any responsibility for the care or custody of the cotton, until it had been insured in its behalf and loaded upon its cars. The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or the legal custody of the cotton until it was so loaded. California Ins. Co. *v.* Union Compress Co., 133 U. S., 387, 415. Upon the facts of this case, it may well be doubted whether liability of the railway company as a common carrier began before the cotton had been received upon its cars, and had thereby come into its actual and exclusive possession and control. St. Louis, I. M. & S. R. Co. *v.* Knight, 122 U. S., 79, 93, 95, 30 Am. & Eng. R. Cas., 88. But, however that may be, the court below clearly went too far in instructing the jury that the railway company, merely by giving bills of lading for the cotton, became responsible for a nuisance resulting from the manner and the place in

Effect of railroad company issuing bills of lading.

which the cotton was kept by the compress company. It was suggested that, because by the statute of Arkansas of March 15, 1887, chap. 60, all warehousemen and carriers were prohibited, under a penalty, from issuing receipts or bills of lading, except for goods which had been actually received into their possession, the railway company must be conclusively presumed to have been in possession of the cotton for which it had issued bills of ladiug. But it might be argued, with equal force, that this statute prevented the bills of lading from binding the railway company before the cotton was actually received into its possession. If the statute has any bearing, it is only upon the question of fact whether the railway company had or had not any share in the custody and control of the cotton, for which bills of lading had been issued, before it was put upon the cars.

As to the hypothesis that the sheds of the compress company and the adjoining street had been made by the railway company one of its receiving stations, and that the compress company was the agent of the railway company, either in receiving or in holding the cotton, it is enough to say that, if the facts have any tendency to support that hypothesis, they fall far short of conclusively establishing it as matter of law.

The circuit court, therefore, erred in refusing to give the fifth, eleventh and twelfth instructions requested, as well as in the instructions which were given to the jury. As for this reason the verdict must be set aside and a new trial ordered, at which an amendment in respect to parties may be allowed in the discretion of the court below, we express no opinion upon the question of pleading under the Code of Arkansas (which is not free from doubt), whether this action was rightly brought in the name of the insurance companies alone, or whether the assured should have been made a party, either as a plaintiff or as a defendant. See Mansf. Dig. §§ 4933, 4934; St. Louis, I. M. & S. R. Co. *v.* Camden Bank, 47 Ark., 541, 548., Judgment reversed and case remanded, with directions to set aside the verdict and to order a new trial.

BROWN, J., not having been a member of the court when this case was argued, took no part in its decision.

Subrogation of Insurance Company to Rights of Insured against Carrier.—The law upon this subject is fully stated and the cases exhaustively cited in the note to the case Fayerweather *v.* Phenix Insurance Co. (N. Y.), 42 Am. & Eng. R. Cas. 340. See, also, note 45 *Id.* 390.

Liability of Compress Company to Carrier for Failure to Obtain Insurance on Cotton.—Under a contract whereby a compress company agrees to

compress all cotton delivered to it by a certain carrier and insure the same for the latter's benefit, and the carrier makes the compress company its agent to receive the same directly from the owners, the compress company, while in possession, is individually liable to the carrier for any damage thereto, to the extent that it has failed to obtain insurance. Deming *v.* Merchants' Cotton Press & Storage Co. (Tenn., June 5, 1891), 17 S. W. Rep. 89.

Stipulation that Carrier Shall Have Benefit of Insurance.—A carrier may provide in his contract of shipment that he shall have the benefit of any insurance effected upon the goods to be transported, and if the owner has received from the insurance company the amount of the loss, he may be precluded by such stipulation from recovering against the carrier. Gulf C. & S. F. R. Co. *v.* Zimmerman (Tex., Oct. 12, 1891), 17 S. W. Rep. 239.

Same—Rule where there is no Indemnity against Negligence of Carrier.—Although a bill of lading issued by a railroad company stipulates that the company shall have full benefit of any insurance that may be effected on the goods, the company is liable for a loss resulting from its negligence, where the insurance policy stipulated that it was not to cover a common law liability of the carrier, but that if the goods were lost while in the care of any carrier, the insurer should "advance" to the assured an amount equivalent to the insured value of the goods so lost, and, if the carrier proved liable, the assured should return to the insurer the amount received from the carrier. Gulf, C. &. S. F. R. Co. *v.* Zimmerman (Tex., Oct. 12, 1891), 17 S. W. Rep. 239.

Liability of Carrier of Cotton Delivered to Compress Company—Usage.—Where, in accordance with usage, a compress company's receipt is delivered by the owner of cotton to the carrier, and a bill of lading issued by the latter, the liability of the carrier to the owner begins, although the cotton is not yet actually delivered to the carrier. Deming *v.* Merchants' Cotton Press & Storage Co. (Tenn., June 5, 1891), 17 S. W. Rep. 89.

Liability of Carrier for Cotton while in Compress—Effect of Stipulation.—A stipulation in a bill of lading that a railroad company shall not be liable for any cotton while in any compress, exempts such carrier from liability for loss occurring therein, although the compress company is the carrier's agent to receive the cotton; but, under such circumstances, a stipulation of exemption from liability for loss while in any "depot" or "station" does not cover loss occurring in said compress. Deming *v.* Merchants' Cotton Press & Storage Co. (Tenn., June 5, 1891), 17 S. W. Rep. 91.

Termination of Carrier's Liability—Failure of Consignee to Remove Goods—Liability of Company as Warehouseman.—In Anniston & Atlantic R. Co. *v.* Ledbetter, 92 Ala. 326, it was held that if the consignee of goods fails to remove them within a reasonable time after notice of their arrival, the liability of the railroad company as a common carrier ceases, and it becomes liable thenceforward only as a warehouseman; and in this case the failure to remove them for one week after notice is held to arise a presumption of such change of liability.

Parol Contract for Shipment of Freight—Abandonment of Written Contract.—In an action against a railroad company for the breach of a contract for the shipment of cattle, evidence of conversation between the plaintiffs and the agent of the defendant is admissible to prove that a written contract for transportation was abandoned, and that the cattle were shipped under a parol contract subsequently made. Toledo, St. Louis & K. C. R. Co. *v.* Levy, 127 Ind. 168.

COVINGTON STOCK YARDS CO.

v.

KEITH *et al.*

(*139 United States 128.*)

Carriers of Live Stock—Stock Yard Facilities—Extra Compensation for Yardage.—A railroad company holding itself out as a carrier of live stock is obliged to provide suitable facilities for receiving and discharging such stock. In certain cases this duty cannot be performed except by providing enclosed yards in which the stock may be received or discharged; and the carrier cannot, in addition to the customary and legitimate charges for transportation, make a special charge for merely receiving or delivering stock in and through such yards.

Same—Duty to Furnish Appliances at Particular Place.—In respect to the mere loading and unloading of live stock at a particular city, the carrier is required to furnish such suitable and convenient appliances as are reasonably sufficient for the business at that place.

ON the 28th of January, 1886, George T. Bliss and Isaac E. Gates instituted in the court below a suit in equity against the Kentucky Central Railroad Company, a corporation of Kentucky, for the foreclosure of a mortgage or deed of trust given to secure the payment of bonds of that company for a large amount; in which suit a receiver was appointed, who took possession of the railroad, with authority to operate it until the further order of the court.

The present proceeding was begun on the 28th of June, 1886, by a petition filed in the foreclosure suit by Charles W. Keith who was engaged in buying and selling on commission, as well as on his own account, live stock brought to and shipped from the city of Covington, Ky., over the Kentucky Central Railroad. The petition proceeded upon the ground that unjust and illegal discrimination had been and was being made against Keith by the receiver, acting under and pursuant to a written agreement made November 19, 1881, between the railroad company and the Covington Stockyards Company, a corporation created under the general laws of Kentucky; the yards of the latter company located in Covington, and connected with the railroad tracks in that city, being the only depot of the railway company that was provided with the necessary platforms and chutes for receiving or discharging live stock on and from its trains at that city. The petition alleged that Keith was the proprietor of certain live stock lots and yards in that city immediately west of those belonging to the Covington Stockyards

Company, and separated from them by only one street 60 feet in width; that he was provided with all the necessary means of receiving, feeding and caring for such stock as he purchased, or as might be consigned to him by others for sale; and that his lots and yards were used for that purpose subsequently to March 1, 1886, and until, by the direction of the receiver, the platforms connecting them with the railroad were torn up and rendered unfit for use. The prayer of the petitioner was for a rule against the receiver to show cause why he should not deliver to him at some convenient and suitable place outside of the lots or yards of the said Covington Stockyards Company, free from other than the customary freight charges for transportation, all stock owned by or consigned to him and brought over said road to Covington.

The receiver filed a response to the rule, and an order was entered giving leave to the Covington Stockyards Company to file an intervening petition against the railroad company and Keith, and requiring the latter parties to litigate between themselves the question of the validity of the above agreement of 1881. The stockyards company filed such a petition, claiming all the rights granted by the agreement referred to, and alleging that it had expended $60,000 in constructing depots, platforms and chutes, as required by that agreement.

Referring to that agreement, it appears that the stockyards company stipulated that its yards on the line of the railroad in Covington should be maintained in good order, properly equipped with suitable fencing, feeding-pens and other customary conveniences for handling and caring for live stock, and to that end it would keep at hand a sufficient number of skilled workmen to perform the operations required of it, and generally to do such labor as is usually provided for in stockyards of the best class, namely, to load and unload and care for "in the best manner all live stock delivered to them by the party of the first part [the railroad company] at their own risk of damage while so doing, and in no event to charge more than sixty cents per car of full loads for loading, and sixty cents per car for unloading, and no charges to be made for handling less than full loads, as per way-bills." The stockyards company also agreed to become liable for those charges, and to collect and pay over to the railroad company, as demanded from time, such money as came into its hands; the charges for feeding and caring for live stock not to be more than was charged for similar services and supplies at other stockyards of the country. The railroad company, upon its part, agreed to

pay the stockyards company the above sums for loading and unloading, and otherwise acting as its agent in the collection of freights and charges upon such business as was turned over to it by the railroad company; that it would require all cars loaded at yards for shipment south or east to be carefully bedded, which the stockyards company was to do at the rates usually charged in other yards; that it would make the yards of the stockyards company its "depot for delivery of all its live stock" during the term of the contract, and not build, "nor allow to be built, on its right of way, any other depot or yards for the reception of live stock." The delivery of stock in cars on switches or sidings provided for the purpose was to be considered a delivery of the stock to the stockyards company, which, from that time, was to be responsible for the stock to the railroad company. To protect the business of the stockyards company from damage in case the railroad extended its track over the Ohio river, the railroad company agreed that during the term of the contract the rate of freight from all points on its road and connections should "not be less than five dollars per car more to the Union yards of Cincinnati than the rate to Covington yards from the same points;" that its business arrangements with any other railroad or transportation line should be subject to this agreement; and that the yards of the stockyards company "shall be the depot for all live stock received from its connections for Cincinnati or eastern markets." The agreement, by its terms, was to remain in force for fifteen years.

In the progress of the cause, E. W. Wilson, by consent of parties, was made a co-petitioner and co-respondent with Keith.

By the final decree it was found, ordered, and decreed as follows: "It is the duty and legal obligation of the Kentucky Central Railroad Company, as a common carrier of live stock, to provide suitable and convenient means and facilities for receiving on board its cars all live-stock offered for shipment over its road and its connections from the city of Covington, and for the discharge from its cars of all live-stock brought over its road to the said city of Covington, free of any change other than the customary transportation charges to consignors or consignees: and that the said petitioners, Keith and Wilson, live stock dealers and brokers, doing business at the city of Covington, and proprietors of the Banner Stockyards at that place, are entitled to so ship and receive over said road such live stock without being subject to any such additional charges imposed by said receiver, said railroad company or other person or corporation.

The court further finds and decrees that the alleged contract entered into by and between the said railroad company and the said Covington Stockyards Company, of date the 19th day of November, 1881, does not entitle the said stockyards company to impose upon any shipper of live stock over said road, passing such stock through the yards of said company to and from the cars of said railroad company, any charge whatever for such passage. It is stipulated in said contract that said stockyards company shall establish and maintain suitable yards or pens for receiving, housing, feeding, and caring for live stock, and to receive all such stock, and load and unload the same upon and from the cars of said company transported on, or to be transported over, said road, for a compensation of sixty cents per car-load, to be paid by said railroad company for and during the period of fifteen years from the date of said contract, which has not yet expired, while the said railroad company agreed that it would not during said period establish, or allow to be established, on the line of its road or on its right of way in said city of Covington, any other platform or depot than that of said stock-yards company for the receipt or delivery of such live-stock. * * * The court doth further find that the general freight depot of the said railroad company in the said city of Covington, at the terminus of its road between Pike and Eighth streets, is not a suitable or convenient place for the receipt and delivery of live stock brought to the said city, or to be shipped therefrom, over said road; and neither said railroad company nor said receiver having provided such suitable depot or place therefor, except the yards of said stockyards company, it is now ordered and decreed that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson at and through the said Covington stockyards all such live stock as may be brought to them, or offered by them for shipment, over said road and its connections, upon the consent of said stockyards, in writing, that it may be so done, being filed in this court and cause on or before the 1st day of January next after the entry of this decree, free of any charge for passing through said yards to and from the cars of said railroad company. In default of such consent being so filed, it is ordered and decreed that, upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the live stock switch of said railroad company north of said stockyards, the said railroad company and said receiver shall receive and deliver all such live stock to said Keith & Wilson as shall be consigned to them or either of them, or be offered by them or

either of them for shipment, at said platform. The said Keith & Wilson shall provide an agent or representative at said platform to receive such cattle as they may be notified by said railroad company or said receiver are to be delivered to them thereat, and they shall give the said railroad company or said receiver reasonable notice of any shipment desired to be made by them from said platform to conform to the departure of live stock trains on said road."

Ed. Baxter, for appellant.

No appearance for appellees.

HARLAN J.—The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier or by some one in its behalf, are sufficient for the reasonable accommodation of the public.

Duty to provide facilities for shipping stock.

But it is contended that the decree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment, and to deliver live stock consigned to them free from any charge, other than the customary one for transportation, for merely passing into and through the yards of the Covington Stockyards Company to and from the cars of the railroad company. As the decree does not require such stock to be delivered in or through the yards of the appellant, except with its written consent filed in this cause; as such stock cannot be properly loaded upon or unloaded from cars within the limits of the city, except by means of inclosed lots or yards set apart for that purpose, and conveniently located, in or through which the stock may be received from the shipper or delivered to the consignee, without danger or inconvenience to the public in the vicinity of the place of shipment or discharge; and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company,—the contention just adverted to is, in effect, that the carrier may, without a special contract for that purpose, require the shipper or consignee, in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent.

Extra compensation for stock yard facilities.

When animals are offered to a carrier of live stock to be transported, it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety, and without inconvenience to the public, while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport, and deliver live stock will not be fully discharged unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

General liabilities of carrier of live stock.

A railroad company, it is true, is not a carrier of live stock with all the responsibilities that attend it as a carrier of goods. North Pa. R. Co. *v.* Commercial Bank, 123 U. S. 727, 734, 35 Am. & Eng. R. Cas. 556. There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arise from the nature of the particular property transported. "But," this court said in the case just cited, "notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced."[1] The same principle necessarily applies to the receiving of live stock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and

*Myrick *v.* Mich. Cent. R. Co., 107 U. S. 102, 107, 9 Am. & Eng. R. Cas. 25; Hall *v.* Renfro, 3 Metc. (Ky.) 51, 54; Mynard *v.* Railroad Co., 71 N. Y. 180; Smith *v.* New Haven & N. R. Co., 12 Allen, 531; Kimball *v.* Rutland & B. R. Co., 26 Vt. 247; Railroad Co. *v.* Henlein, 52 Ala. 606, 613; Wilson *v.* Hamilton, 4 Ohio St. 722, 740; Ayres *v.* Chicago & N. W. R. Co., 71 Wis. 372, 35 Am. & Eng. R. R. Cas. 679; McCoy *v.* K. & D. M. R. Co., 44 Iowa, 424, 426; Maslin *v.* Baltimore & O. R. Co., 14 W. Va. 180; St. Louis & S. E. R. Co. *v.* Dorman, 72 Ill. 504; Moulton *v.* St. Paul, etc., R. Co., 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; Kan. Pac. R. Co. *v.* Nichols, 9 Kan. 235; Clarke *v.* Rochester & S. R. Co., 14 N. Y. 570; Palmer *v.* Grand J. R. Co., 4 M. & W. 749.

to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stockyards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stockyards which itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

We must not be understood as holding that the railroad company in this case was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling, or shipping live stock chose to establish stockyards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellant are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and, if the appellees had been permitted to use them without extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stockyards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stockyard of its own for shippers and consignees, the court below

Sufficiency of facilities at Covington.

did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stockyards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation.

Decree affirmed.

Railroad Stockyards and Stockyard Companies.—The business of a stock yards company, except in the character of the property which is the subject of bailment, is similar to the business of a warehouseman, and it cannot be compelled, in the absence of a contract, to receive stock of any persons or corporations. Delaware, L. & W. R. Co. *v.* Central Stockyards & Transit Co., 46 N. J. Eq. 280, 42 Am. & Eng. R. Cas. 524. 42 N. J. Eq. 50, 37 Am. & Eng. R. Cas. 607. Thus a stockyards company, whose charter authorizes it to make contracts with the several railroad companies having a terminus in the county in which its yards are located for the transportation and delivery of stock, is under no obligation to receive stock from a railroad company except in so far as it binds itself to do so by contract. Delaware, L. & W. R. Co. *v.* Central Stock Yards & Transit Co., 46 N. J. Eq. 280, 42 Am. & Eng. R. Cas. 524.

Where a person agrees to construct stockyards and a railroad company agrees to send all stock to those yards unless otherwise ordered by the shippers, if the company takes cattle to other yards, not especially ordered there, it breaks its contract and is responsible in damages, and evidence as to the number of car loads taken to other yards is admissible as fixing the measure of damages. Terre Haute & I. R. Co. *v.* Struble, 109 U. S. 381, 16 Am. & Eng. R. Cas. 597.

In Delaware, L. & W. R. Co. *v.* Central Stockyards & Transit Co., 43 N. J. Eq. 71, 31 Am. & Eng. R. Cas. 82, an injunction, to compel a stockyards company to receive at their stockyards from a railroad company live freight carried over their road and consigned for delivery at the defendant's yard, was refused, because the question whether the defendants were subject to any duty to the complainants to receive such stock, was, as a matter of law, unsettled, and because the injunction asked for was mandatory in its character, and such writs are never granted until a final hearing.

In Coe *v.* Louisville & Nashville R. Co., 3 Fed. Rep. 775, a preliminary injunction was granted to restrain the withdrawal of railway connections with an old established stock yard, the withdrawal being attempted to aid in the erection of a monopoly at another point.

In London, etc. R. Co. *v.* Truman, (Eng.), 25 Am. & Eng. R. Cas. 116, the court refused to enjoin a railroad company from maintaining cattle yards near the plaintiff's residence on the ground that the same was a nuisance, it appearing that the yards were maintained on land acquired by the company under a statute for such purposes.

A stockyards company, authorized to construct a railway to connect with the tracks of railroad companies, is subject to the same responsibilities as railroad companies in the operation of its railroad, and is liable for

the negligence of another corporation using it by permission. Pennsylvania Co. *v.* Ellett, 132 Ill. 654, 42 Am. & Eng. R. Cas. 64.

Negligence in Keeping Suitable Cattle Pens—Contributory Negligence of Shipper.—A railroad company, being a common carrier of live stock, cannot absolve itself from the statutory duty to keep suitable pens for the shipment of cattle, by showing that such pens were so badly constructed as to make it contributory negligence on the part of the shipper to use them. Gulf C. & S. F. R. Co. *v.* Trawick, (Tex., Feb. 6, 1891), 15 S. W. Rep. 568.

When Carrier's Liability for Live Stock Commences.—Where cattle have been placed in a pen by direction of the carrier's agent, for immediate shipment, and part of them have been actually placed in the cars, the cattle are to be considered as having been received by the carrier for shipment and held by it as a common carrier and not as a warehouseman. Gulf C. & S. F. R. Co. *v.* Trawick, (Tex., Feb. 6, 1891), 15 S. W. Rep. 568.

FT. WORTH & DENVER CITY R. CO.

v.

GREATHOUSE.

(*Texas Supreme Court, November 3, 1891.*)

Carriers of Live Stock—Loss of Cattle in Weight—Opinion Evidence.—In an action against a railroad company to recover damages for the loss in weight of cattle alleged to have been negligently transported by it, where there is nothing to show the difference in weight at the point of shipment and at their destination, a witness who is familiar with the shipment of cattle between the two points, and who was with the cattle in transit, and was present and saw the effect of a wreck, which shook up and bruised the cattle and delayed the train many hours, may be allowed to give his opinion as to the loss of cattle in weight. And a witness who has had large experience in the shipment of cattle, but had no personal knowledge of the cattle in controversy or of the wreck, was properly allowed, upon the facts being stated to him as a hypothetical case, to give his opinion as to the result of the alleged acts of the carrier in occasioning shrinkage in the cattle and its extent.

Knowledge by Carrier that Cattle were being Shipped for Immediate Sale—Notice to Agent.—If the agent of a railroad company, at the time of the shipment of cattle to a distant market, knows that they are being shipped there for immediate sale, the carrier is affected with knowledge of this fact.

Limitation of Carrier's Liability to Value of Cattle at Place of Shipment.—Where cattle are shipped by rail and injuries and damages result from a violation of the contract of shipment, growing out of the negligence of the carrier, the carrier cannot restrict and limit its liability to less than the true value of the property, and a stipulation that in case of loss or partial loss the shipper's damages shall be limited to the value of the cattle at the place of shipment, cannot affect the shipper's right to recover the value of the cattle at the place of their destination.

Delay in Transporting Cattle—Measure of Damages—Market Price at Place of Destination.—The market price of cattle at the place of destination at the time they should have arrived, should govern, in order to ascertain their value, where the carrier had knowledge that they were

shipped to that place for immediate sale and was guilty of negligent delay in forwarding them.

Injury to Cattle by their Inherent Viciousness—Burden of Proof.—Where a carrier of live stock seeks to escape liability for loss and injury thereto, on the ground that the cattle were injured by their inherent viciousness and disposition to hurt each other, the burden is upon him to prove these facts; and if this issue was not raised by pleading and proof, an instruction as to the exemption of the carrier from liability in such cases, is properly refused.

Stipulation Requiring Shipper to give Notice of Claim—Reasonableness of Provision.—In order that a carrier may take advantage of a stipulation in a contract for the shipment of cattle, requiring the shipper in case of loss or injury, to give the carrier notice of his claim before removing the cattle from the place of delivery, the carrier must prove that such conditions in the contract are reasonable, and must show by proper pleadings and evidence the existence of facts that call for an enforcement of the condition.

Interest on Damages.—Although there is no pleading asking for interest, in an action by a shipper to recover damages for the negligent transportation of live stock, it is proper for the jury to allow interest on the amount of damages sustained.

COMMISSIONERS' decision. Section B. Appeal from Wise District Court.

This suit is by appellee against appellant to recover damages sustained growing out of a violation of a shipment of cattle from Harrold, Tex., to Chicago, Ill.. The petition, in substance, alleges that on the 3d day of September, 1887, plaintiff delivered to Harrold, for shipment to Chicago, 149 head of beef cattle; that defendant received the cattle and agreed by written contract with plaintiff to transport the cattle to Chicago without delay. They were immediately loaded upon the cars, and were in good condition, fat and suitable for beef, and were in as good condition as any cattle then being shipped to the Chicago market; and were shipped for the purpose of being sold in that market for beef, and the purpose for which they were being shipped was well known to the agent of defendant. The written contract for the shipment of the cattle is attached to and made a part of the petition. It was, among other things, provided in said contract that, as a condition precedent to plaintiff's right to recover for any damages for loss or injury to his said stock during the transportation thereof, or previous to loading thereof for shipment, he would give notice in writing, verified by affidavit, of his claim therefor to some general officer of defendant, or its nearest station agent, before said stock was removed from the point of shipment or from the place of destination, and before such stock was mingled with other stock, within one day after the delivery of such stock at its point of destination, and before the same shall have been removed,

slaughtered or mingled with other stock, to the end that such claim might be fully and fairly investigated, and that a failure to comply with that provision of the contract should be a complete bar to any recovery of any and all such claims. It is further alleged in plaintiff's petition that, at the same time and place that plaintiff shipped his cattle, Rush & Hutchinson, a firm composed of William Rush and J. W. Hutchinson, shipped 145 head of beef cattle; I. L. Hutchinson, 33 head; G. W. Gill and W. L. Rush, who were partners, shipped 45 head. All of said cattle shipped by said persons were received by defendant, in the same manner and by the same agent of defendant, and were loaded on the same train of cars on which the cattle of plaintiff were loaded and were to be carried to Chicago. That said persons had a written contract with defendant for carrying their cattle, the same in substance, as the one entered into by plaintiff, and which is made a part of his petition; and that all of said cattle were shipped to Chicago to be marketed as beef cattle; that said cattle were shipped as aforesaid, on the date aforesaid, and were transported over defendant's line of road to Henrietta, Tex., where they were transferred to the Missouri Pacific Railway; that while being transported over the Missouri Pacific Railway, through the negligence of the Missouri Pacific Railway Company, and by reason of the unsafe condition of said railroad, and by reason of said railroad being out of repair, said cattle were delayed on the road at a point between Henrietta and Denison, Tex., for a period of 20 hours, without food or water; that at a point between between Gainesville, on said line, and Denison, by reason of said railroad track being out of repair, said train of cars ran off the track, and one of plaintiff's cattle was killed, worth $25; that all of said cattle were bruised, injured and greatly damaged; that two belonging to Rush & Hutchinson were injured so that they were worth $15 less than they were worth before said injury; that, by reason of said delays and other delays, the cattle had to have an extra feed, which cost plaintiff $15, Rush & Hutchinson, $15, Gill, $9, and I. L. Hutchinson, $8; that by reason of the cattle being bruised and injured, and by reason of the delay on the road, the cattle lost in weight forty pounds per head, thereby damaging plaintiff in the sum of $150, Rush & Hutchinson, $144, Gill & Rush, $30.40, and I. L. Hutchinson, $36.40; that when the cattle arrived in Chicago the market had declined fifteen cents per hundred pounds below what it was when the cattle should have reached there, and thereby plaintiff was damaged in the sum of $200, Rush & Hutchinson, $166.47, Gill, $129, and I. L. Hutchinson, $105.04; that the claims of Rush

& Hutchinson, G. W. Gill and I. L. Hutchinson had been assigned to plaintiff, and defendant had refused to pay plaintiff, to his damage $1,200. The defendant answered by general demurrer and general denial. The jury returned a verdict in plaintiff's favor for $900, for which amount judgment was rendered against appellant. The evidence offered in behalf of plaintiff by several witnesses proved the allegations of his petition in reference to the shipment of the cattle from Harrold to Chicago, and when and how they were injured, and that the injury and delay occurred through the negligence of the Missouri Pacific Railway Company; that the effect of the wreck by which the cattle were injured was to shake them up and skin and bruise them, and that they were confined in the cars about twenty hours longer than they would have been if no wreck had occurred, and thus they were delayed in their arrival at Chicago twenty hours. The evidence shows the character and kind of cattle shipped and the purpose for which they were shipped, being for sale in the Chicago market; and it further is satisfactory in showing that the agent of appellant at Harrold knew of such purpose when the contract was made. Several witnesses testified as to the number of cattle shipped, and the weight of the cattle in Chicago, and what effect the injuries and delay would have upon the weights of the cattle and the condition of the Chicago market when the cattle ought to have arrived, and the state of the market when they did arrive. In fact the evidence substantially establishes the items of damages as alleged in the petition. The proof is further satisfactory on the point that appellee was the owner of the claim of damages of the other consignors who shipped with him. No evidence appears showing that plaintiff gave notice to any officer or station agent of appellant concerning the extent of the injuries and damages to the cattle. No evidence on any branch of the case was introduced by appellant.

J. M. O'Neill, for appellant.
Carswell, Fuller & Terrell, for appellee.

FISHER, J.—1. Appellant on the trial of the case objected to the fourth and fifth interrogatories propounded by plaintiff to witnesses Meyers and Davidson, and the answers thereto, on the ground that they were leading. Without deciding whether the interrogatories are leading, we think no injury resulted to appellant by their admission in evidence; because the facts of the wreck and the delay inquired about, and the number of cattle in the train at the time, and the results of the wreck as affecting the cattle, further inquired about in the inter-

Objections to interrogatories.

rogatories, are all facts testified to by other witnesses in the case, and concerning which there is no conflict in the evidence. The answers brought out by these interrogatories are simply cumulative of the undisputed evidence in the record.

2. Witness Rush, in testifying as to the weights of the cattle of Rush & Hutchinson in Chicago, was unable to state from recollection the weights, and was, over the objection of appellant, permitted to use a memorandum in order to refresh his memory as to the weights. It is not necessary for us to pass upon the admissibility of this evidence, for no harm resulted from its admission, as the weights of the cattle shipped by Rush & Hutchinson in Chicago are fully proven by the testimony of G. R. Greathouse, which is not contradicted in any particular, and who agreed in his estimate of weights with the evidence of Rush. The admission of improper evidence upon the trial will not work a reversal, when it is apparent that it had no injurious effect upon the rights of a party, and when its effect could not have influenced the jury to arrive at any other result than that reached.

Admission of improper evidence—Error without injury.

3. Over the objection of appellant, witness Rush was permitted to testify as to what, in his opinion, or according to his best judgment, was the loss in weight of the cattle by reason of the injuries occasioned by the wreck, and by reason of the delay in getting them to Chicago. The evidence shows that this witness was familiar with the cattle, and testified fully as to the wreck, he being at the time present, and witnessed it, and its effect upon the cattle. The evidence establishes the fact that he was experienced in shipping cattle, and that he was familiar with the condition of the Chicago market, and the time it ordinarily takes to make the run from Harrold to Chicago, and testifies as to the delay occasioned by the wreck, and its effect upon the cattle; that they were bruised and jammed together; and that, by reason of the delay, they were confined in the cars about twenty hours longer than otherwise they would have been if the wreck had not occurred; and that confinement in the cars causes cattle to draw up and shrink. The evidence informs us that the cattle, at the time of delivery for shipment to the carriers, were fat, healthy beeves, fit for the Chicago market. No information is furnished showing what the cattle weighed when shipped. All we have upon this question is evidence fixing the weight at Chicago. It becomes very important to fix the difference in weight, if any, of the cattle at the place of shipment, and of the wreck,

Opinions of witnesses as to shrinkage.

and in Chicago, in order to ascertain the extent of the damages resulting from shrinkage. The effect of the wreck, and the delay and injuries occasioned thereby, are the only facts shown, independent of the opinion of the witnesses, that the jury can look to in ascertaining the loss in weight, if any. They have before them no proof as to the difference in weight between Harrold and Chicago. The proof of these facts will not inform the jury what the loss in the weight of the cattle is. It can readily be assumed from these facts that some shrinkage occurred, but the inquiry is the extent of this shrinkage, and this cannot be learned simply by proof of facts showing injury. The extent of loss in weight is not a matter of common knowledge that the jury is supposed to be informed of, but the ascertainment of this fact can only be learned from the experience of men who are familiar with the effect of these acts upon the physical condition of the cattle, and whose knowledge is acquired in handling cattle under like circumstances and conditions in which the cattle in controversy were at the time of injury before and after. We think the evidence admissible. Whart. Ev. §§ 444-446, and notes; Id. §§ 447, 448, and note 3; Id. §§ 449, 450, 509-513; Tompkins v. Toland, 46 Tex. 590; Long v. McCauley, (Tex. Sup.) 3 S. W. Rep. 691.

For the same reasons as those just considered, objections were made to the testimony of witness Carpenter, with this difference; Carpenter had large experience in the shipment of cattle, but no personal knowledge of the cattle in controversy or of the wreck. The fact of the wreck, and its results as to the injury and the delay of the cattle in getting them to the place of destination, was put to him as a hypothetical case, and his opinion was asked as to the result of these acts in occasioning shrinkage in the cattle, and its extent. We think the hypothetical case, as presented in the question asked the witness, is substantially in accord with the facts. Even though the hypothetical case as stated does not cover the full range of the facts, this alone would not make the question objectionable, provided enough is given upon which the witness can formulate an intelligent opinion. The failure of an accurate statement of all the facts in the case in propounding the hypothetical question does not render it inadmissible, but simply affects the weight of the testimony of the witness in response to the question. For the reason given in considering the objections to the evidence of witness Rush we think the opinion of witness Carpenter admissible.

4. Objection is urged to the evidence of witnesses Rush and Greathouse in proof of the condition of the Chicago

market for the reason that appellant or its agent had no notice that the cattle were to be sold in Chicago market immediately on arrival. This objection is not tenable. The facts show that the agent of appellant at the time of shipment knew that the cattle were being shipped to Chicago for immediate sale. The evidence of Greathouse, uncontradicted, is that the agent said that the cattle "would go to Chicago in ninety hours and go in on the morning market.

Carrier charged with agent's knowledge.

5. Several objections are urged to the charge of the court. We deem it unnecessary to discuss in detail all of these objections. We have carefully examined the charge, and we think it correctly presented the law of the case. And we cannot agree with the appellant that it was "calculated to mislead and confuse the jury, and that it did not require the jury to base their verdict upon the evidence, but upon what they believed." To admit that the charge, as a whole, was calculated to have this effect, is to regard the jury that tried this case of such low degree of intelligence that they were incapable of understanding their duty under a charge that would meet the test required by appellant.

Objections to instructions.

6. Objection is made to the refusal of the court to give a charge requested by appellant, to the effect "that if the cattle sold in Chicago for as much as they were worth at Harrold at the time of shipment, and the freight charges and expenses of putting them on the market, they should not find any damages on account of shrinkage in weights or decline in market." The evidence raises no issue as to the freight charges, and there is contention made that such charges have not been paid appellant. This charge is asked upon the assumption that, as the contract provides in case of loss or partial loss the value of the cattle at the place of shipment would be the measure of damages, consequently the value of the cattle at Harrold should govern. We do not deny the privilege of the carrier and shipper to make contracts fixing the valuation of articles shipped that would in some cases be binding and conclusive upon the parties to the contract; but we do hold that, where the injuries and damages result from a violation of the contract of shipment growing out of the negligence of the carrier, it cannot restrict and limit its liability to less than the true value of the property. Southern Pac. R.Co. *v.* Maddox, 75 Tex. 300,42 Am. & Eng. R. Cas. 528; Missouri Pac. R. Co. *v.* Harris, 67 Tex. 169, 28 Am. & Eng. R. Cas. 107; Boehl *v.* Chicago, Minn. & St. P. R. Co., 44 Minn. 191, 45 Am. & Eng. R. Cas. 351;

Damages—effect of stipulation—value of cattle at destination.

Missouri Pac. R. Co. *v.* China Manuf'g Co., 79 Tex. 26. The evidence fully establishes the fact that the injuries and damages to the cattle resulted from the negligence of the Missouri Pacific Railway Company, which was carrying the cattle over its line under the contract entered into by appellant and appellee. No question is raised in this case as to the non-liability of appellant by reason of the damages and injuries occurring off of its line of road. It is shown by the evidence that the carrier, at the time of shipment, knew that the cattle were being shipped to Chicago for immediate sale. As one of the incidents of the contract, it must be held, under the facts of this case, that the parties bound by it had in contemplation at the time of its execution the fact that the cattle were being shipped to Chicago for sale at the market price existing when the cattle should reach there in a reasonable time. Under such state of facts, the market price of the cattle at the place of destination should govern in order to ascertain their value. Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 42 Am. & Eng. R. Cas. 528; Missouri Pac. R. *v.* Fagan, 72 Tex. 129, 35 Am. & Eng. R. Cas. 666. The carrier was bound to deliver the cattle at Chicago within a reasonable time or the time agreed upon by the parties to the contract. It is shown that they reached Chicago twenty hours later than they should have. The difference in the state of the market at the time the cattle were delivered and the time they should have been delivered is shown. The difference is recoverable, the shrinkage in weights, traceable as the results of the wreck and the delay, is a proper charge against appellant as damages; the value of this loss of weight to be ascertained by reference to the Chicago market when the cattle ought to have arrived there.

7. Objection is made to the refusal of court to give the charge asked by appellant to the effect "that appellant was not liable for injuries done to the cattle by each other by reason of any inherent vice in the cattle or disposition to hurt each other." The court in its general charge limited the jury to the consideration of injuries to the cattle that were occasioned by and resulted from the wreck and delay. Further there was no evidence upon this point that would justify such a charge. If the defendant desired to raise this issue, it should have done so by pleading and proof. The burden was upon it to prove that the cattle were injured by their inherent viciousness and disposition to hurt each other. Boehl *v.* Chicago, M. St. P. R. Co., 44 Minn. 191, 45 Am. & Eng. R. Cas. 351. It is not intended to hold that, if it had been

Injuries by inherent viciousness of cattle.

shown from the evidence introduced by the plaintiff that the beeves were injured by reason of the "proper vice" of the animals, the defendant could not urge such facts in defense to plaintiff's demand, in whole or in part.

8. It is insisted by appellant that the court erred in overruling its demurrer to plaintiff's petition, "because it does not appear from the allegations that plaintiff gave notice of his claim for damages to the nearest station agent before the cattle were removed from the place of delivery." Without determining whether this provision in a contract, such as in this case, will in any case be enforced, we do not think the appellant has brought itself within the rules laid down in those cases that permit such contracts to be enforced, and that recognise their legality. When such provisions of a carrier's contract are enforced, it is upon the assumption that such agreement is reasonable, when considered in the light of the subject matter of the contract and the circumstances and surroundings of the parties. To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show, by proper pleadings and evidence the existence of facts that call for an enforcement of the condition. There were no pleadings and proof whatever upon this question coming from the carriers. Missouri Pac. R. *v.* Fagan, 72. Tex. 132, 35 Am. &. Eng. R. Cas. 666; Missouri Pac. R. Co. *v.* Harris, 67 Tex. 167, 28 Am. & Eng. R. Cas. 126.

Stipulation requiring shipper to give notice.

9. It is insisted that the verdict of the jury exceeded the amount of damages as shown by the evidence. If interest is added to the sums and items of damages in evidence in the case, it will exceed the amount of plaintiff's recovery. We think, although there is no pleading asking for interest, that it is proper to allow it in this case on the amount of damages sustained. Houston & T. C. R. Co. *v.* Jackson, 62 Tex. 212, 21 Am. & Eng. R. Cas. 126. We conclude that the case should be affirmed.

Interest on damages.

STAYTON, C. J. Affirmed as per report of commission of appeals.

Delay in Shipping Cattle—Amount of Damages.—In an action against a railroad company for delay in delivering cattle carried by it, a verdict for $745 is warranted by evidence that the cattle sold in the market for $5,027, and that, had they been delivered in proper time and in proper condition, they would have sold for from 25 to 35 per cent. more. Missouri Pacific R. Co. *v.* Russell (Tex. Dec. 15, 1891), 18 S. W. Rep. 594.

A verdict for $700, in an action for delay in transporting cattle, is not excessive where the evidence shows that according to the market price at the place of destination the cattle would have sold for $698 more than

they did, if they had been shipped as agreed upon, and that the plaintiff incurred further expense amounting to $95 in caring for such cattle while awaiting shipment. Gulf C. & S. F. R. Co. *v.* McCarty (Tex., Dec. 22, 1891), 18 S. W. Rep. 716.

Same—Measure of Damages.—The measure of damages, in an action against a railroad company for delay in transporting cattle, is the difference in the market value of the cattle at the place of destination at the time they should have arrived and at the time they did arrive. Gulf C. & S. F. R. Co. *v.* McCarty (Tex., Dec. 22, 1891), 18 S. W. Rep. 716.

Same—Effect of Purpose of Shipper to Sell on Sunday—Illegal Consideration.—The fact of an illegal purpose of a shipper of cattle to sell them in the market on Sunday is not raised, in an action against the carrier for delay in their transportation, by a request to charge that a contract by a railroad company to transport the cattle to their destination on Saturday, in consideration of a certain sum, is void because based on an illegal consideration. Waters *v.* Richmond & D. R. Co., 108 N. Car. 349.

Same—Evidence to Show Price at Sales on Sunday.—Evidence to show price of cattle at sales in the market on Sunday, in an action against a railroad company for breach of a contract to transport cattle to their destination on Saturday, is not admissible when Sunday sales are forbidden by statute. Waters *v.* Richmond & D. R. Co., 108. N. Car. 349.

LOUISVILLE & NASHVILLE R. CO.

v.

SOWELL.

(*Tennessee Supreme Court, March 3, 1891.*)

Carriers of Live Stock—Limitation of Liability to Sum Named.—A contract for the shipment of live stock providing for the payment in case of loss of an agreed value or a limit of value, the sum named being expressly agreed to be the reasonable value of the stock, is one which may be lawfully made between a shipper and a common carrier.

Plea of Contract Limiting Liability—Replication—Duplicity.—A replication, in answer to a plea that a carrier's liability was limited by contract to an agreed valuation, which avers that the plaintiff did not agree to such a stipulation, and that it was unlawful as against public policy, is bad for duplicity.

Terms offered by Carrier—Evidence.—In an action for injury to a horse transported by a railroad company, the carrier set up a stipulation contained in the contract of shipment, by which his liability was limited to a particular amount. The shipper averred that the carrier refused to ship the horse under any other than this special contract. *Held*, that it was error to exclude the testimony of the carrier's agent that it was ready and willing to ship upon fair and reasonable terms without a limitation, on the ground that it was not shown that such terms were tendered, it being admitted by both parties that none were demanded.

ERROR from Maury Circuit Court.
Hughes & Hatcher, for plaintiff in error.
Webster & Taylor, for defendant in error.

SNODGRAS, J.—The defendant in error sued the Louisville

& Nashville Railroad Company for damages consequent upon an injury to a horse which he was having transported from Montgomery, Ala., to Columbia, Tenn., and which he alleged was injured by the negligence of the railroad company in course of transportation. He obtained verdict and judgment for $550. The company moved for a new trial, and its motion was overruled, and it appealed, and signed error. These go to the pleading, evidence, and charge, but are all practically disposed of by a construction of the contract under which the shipment was made, and therefore we determine, first, the effect of that instrument. It was what is known as a "live-stock contract," with limited liability clause, upon an agreed valuation as follows: "And it is further agreed that, should damages occur for which the railroad company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack $200, for a horse or mule $100, which amounts it is agreed are as much as such stock as are herein agreed to be transported are reasonably worth."

Case stated.

If the clause quoted is an agreement as to limit of the valuation of the particular horse injured, and is valid, the judgment is erroneous. The circuit judge charged that it was not an agreement as to the value of this particular horse, and, besides, the clause was void, because it limited defendant's liability for its own negligence. In the contract this clause follows that in which the railroad company acknowledged receipt for shipment of four horses, the one injured making one of that number. It manifestly referred to all received, and was as definite and specific in effect as though it had named or perfectly described the horses shipped. It was in reference to them, and only to them, it became a contract when signed and accepted by the shipper, and needed no more particular reference. The question is whether such a contract is void, as against public policy. It is not now a matter of controversy that a common carrier cannot by contract exempt itself from liability for its own negligence. New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Coward *v.* East Tennessee, V. & G. R. Co., 16 Lea, (Tenn.) 225; Louisville & N. R. Co. *v.* Wynn, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312. These cases are cited, not merely to support the proposition, for it needs no support, but to call attention to the precise contracts upon which they were predicated, and to the distinction between them and another class of cases holding that a contract for payment of an agreed value or limit of value is one which can be lawfully made between a shipper and a

Limitation of Liability to particular amount.

common carrier. In the three cases named the question decided was presented in different aspects. The Lockwood case was a suit to recover damages for injury to the person of a drover sustained while traveling on a freight train in charge of certain cattle he had shipped under a special contract providing, among other things, that the person accompanying the cattle should be carried free of charge, but at his own risk of personal injury from whatever cause. The case in 16 Lea was a suit to recover for lost baggage of passenger. He had accepted a ticket, and signed a contract attached, providing that "none of the companies represented in this ticket will assume any liability on baggage, except for wearing apparel, and then only for a sum not exceeding $100. There was no agreement as to valuation of baggage carried and lost, and the railroad company was held responsible for full value. The case of Louisville & N. R. Co. *v.* Wynn, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312, was an action for damage for value of a horse shipped under the following agreement as to limitation of liability: "It is further agreed that should damage occur for which the railroad company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount is claimed shall not exceed, * * * for a horse or mule, $100." There was no agreement as to the value of the animal shipped. It was of much greater value than the limit fixed in the contract. The circuit judge ignored this limitation in his charge, and the charge was approved by this court.

The contract now under consideration is not governed by these cases. It is not a mere exemption from liability, without more. On the contrary, it is the assumption of liability to the full limit of the value of the property, as agreed upon by the parties to the contract. Such a contract, fairly made, is not void, as against public policy or for any other reason. Hart *v.* Pennsylvania R. Co., 112 U. S. 331, 343, 18 Am. & Eng. R. Cas. 604. This case refers to the numerous rulings *pro* and *con* on the question, and discusses it at length with much force and clearness, settling it in accordance with the weight of authority as stated. We content ourselves by referring to the opinion and its citations, without giving the grounds on which they rest. The charge of the circuit judge was therefore erroneous.

This disposes of some other questions in the record of evidence as to value, and incidentally of others in the pleadings, but it is proper, if not necessary, to notice one or two assignments more particularly. There was no effort to show that this contract was not in fact executed. No plea of *non est factum* is filed. In one replica-

Pleading—Duplicity.

tion to defendant's plea of the contract, it is claimed thereunder that the liability assumed on agreed valuation was only $100. Plaintiff averred that the contract was unlawful; that he did not agree to it; and joined issue on so much of the plea as denied tender of the horse to defendant as common carrier. In another he averred that he did not agree as stated, and that the clause was inserted without his consent, and is contrary to public policy, etc. The defendant moved to strike out these replications, because they were bad for duplicity, tendered issues of law and fact, and, as to denial of contract, were in effect pleas of *non est factum* and were not sworn to. The motion being overruled, defendant demurred for the same reason. The demurrer was likewise overruled, the defendant assigns this as error. The assignment is well taken. The replications were bad, and must be stricken out.

The plaintiff averred in his declaration that defendant declined to ship the stock under any other than the special contract. The defendant denied this. There was testimony to sustain both the averment and plea. On this issue defendant proposed to prove by witness Thompson if "shippers were allowed their choice as to the manner of contract they would ship under, and also what were his instructions and duties (as defendant's agent) when parties chose not to ship under the live-stock contract proven." To this plaintiff excepted, because it was not shown "that any tender of such a contract of shipment was made." This exception was sustained and the evidence excluded, and this is assigned as error. It was error to refuse to permit defendant to make this proof. Both the witnesses for plaintiff and defendant agreed that no other contract than that signed was tendered, but they also agreed that no other was demanded. It was therefore competent for defendant to show that it was willing and ready to execute another upon terms reasonable to the shipper, if he preferred it, in which no agreed valuation or limitation of liability was required as a prerequisite to the shipment. He need not specifically tender another contract. An offer or readiness to make it is sufficient. Louisville & N. R. Co. *v.* Gilbert, 88 Tenn. 431-435, 42 Am. & Eng. R. Cas. 372, Louisville & N. R. Co. *v.* Manchester Mills, 88 Tenn. 653. The judgment of the circuit court is reversed, and the case remanded for a new trial. The defendant in error will pay the cost of appeal.

Terms offered by carrier - Evidence.

Limitation of Liability by Carriers of Live Stock.

Authority of Carrier to Stipulate for Agreed Valuation.—In Chicago, R. I. & P. R. Co. *v.* Witty (Neb. June 30, 1890), 49 N. W. Rep. 183, it was held that a common carrier of live stock cannot by contract with a shipper relieve itself, either in whole or in part, from liability for injury or loss

resulting from its own negligence. The court said: "It is claimed that the limitation in the contract as to the amount of damages in case of loss or injury does not tend to exempt the carrier from liability for negligence. The authorities cited in brief of plaintiff in error so hold, but we are unable to draw such a distinction. If a carrier, cannot, by stipulation, be relieved from liability for its negligence, it is equally clear, for the same reason, that it cannot, by contract with the shipper, limit the amount of recovery of damages resulting from such negligence. If the plaintiff in error can lawfully stipulate that the damages shall not exceed $100, it could likewise contract that it should not be more than $25, or any smaller sum; thereby practically relieving itself from all responsibility for injuries occasioned by its own negligence. That would be accomplishing indirectly what it could not lawfully do directly. The proof fully shows that the horse when shipped was worth not less than $400; and to hold that the owner can only recover one-fourth that sum would be to exempt the carrier from a part of the liability assumed by it for injuries resulting from its own carelessness or negligence. This the law will not sanction. Morrison *v.* Phillipps & C. Construction Co., 44 Wis. 405; Black *v.* Goodrich Transportation Co., 55 Wis. 319; Kansas City, St. J. & C. B. R. Co. *v.* Simpson, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158; Southern Express Co. *v.* Moon, 39 Miss. 822; Chicago, St. L. & N. O. R. Co. *v.* Abels, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; United States Express Co. *v.* Backman, 28 Ohio St. 144; Moulton *v.* St. Paul, M. & M. R. Co., 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; Boehl *v.* Chicago, M. St. P. R. Co., 44 Minn. 191, 45 Am. & Eng. R. Cas. 351; Adams Express Co. *v.* Stettaners, 61 Ill. 184; Oppenheimer *v.* United States Express Co., 69 Ill. 62; Grogan *v.* Adams Express Co., 114 Pa. St. 523, 30 Am. & Eng. R. Cas. 9." See generally as to validity of stipulations for an agreed valuation, Boehl *v.* Chicago, M. & St. P. R. Co. (Minn.), 45 Am. & Eng. R. Cas. 351; Western R. of Alabama *v.* Harwell (Ala.), 45 *Id.* 358; Louisville & N. R. Co. *v.* Wynn (Tenn.), 45 *Id.* 312, note 319.

Stipulation that Shipper Accepts the Car—Palace Horse Cars Owned by Another Company.—In Louisville & N. R. Co. *v.* Dies (Tenn.) Jan. 30, 1892), 18 S. W. Rep. 266, it was held that a contract for the shipment of live stock, wherein the shipper stipulates that he has examined the car, and accepts it as suitable and sufficient, did not estop him from recovering for injuries to an animal caused by a defect in the car, since a carrier cannot limit its common-law liability so as to exempt itself from the consequences of it own negligence in furnishing an unsafe vehicle. Nor does the fact that the animal was shipped in a palace horse-car, owned by an independent company, which was paid for its use by the shipper, exempt the railroad company which ran the car, and with which the contract of shipment was made, from liability for injuries sustained from a defect in the car, as a carrier cannot escape responsibility by carrying its freight in cars furnished or owned by another company. The court said: "The carrier cannot escape responsibility by carrying its freight in cars furnished by or owned by another company. It was a common carrier with respect to this shipment, and it was a matter of no importance who owned or furnished or paid for the particular car into which this stock had been loaded. This has been thoroughly well settled with respect to its liability to passengers. In the case of Pennsylvania Co. *v.* Roy, the passenger was injured by reason of a defect in a Pullman palace-car in which he was riding. Although the car belonged to the Pullman Company, and was in the immediate control of its own agents and employes, the supreme court of the United States was unanimously of the opinion that this car being a part of the train under the control of the railway company made the latter liable for any defect in the car whereby

one of its passengers was injured. 102 U. S. 452, 1 Am. & Eng. R. Cas. 225. So in the case of Louisville, N. & G. S. R. Co. *v.* Katzenberger, 16 Lea, (Tenn.), 380, the railway company was held liable for the loss by a passenger of his hand baggage while riding in a sleeping-car under the special care of the servants of an independent sleeping-car company. That the car made a part of the train of the railway company, fixed its responsibility as a carrier. The rule applicable to the carriage of passengers in the case of an independent company applies with full force to the carriage of stock in special cars, owned by an independent company."

Action on Special Contract.—Where there is a special contract varying the liability of the carrier, the action is properly brought on the special contract, and not on the general liability. Boaz *v.* Central R. & B. Co., 87 Ga. 463.

Limitation of Time for Bringing Action—Waiver.—A provision in a shipping contract, limiting the time for bringing action thereon, is waived by the carrier inducing the shipper by promises to pay, to delay bringing suit until after the time has expired. But where the statements as to the payment of the claim are made by the carrier's local agent, merely as his opinion, and he states that he has no authority in the matter, the carrier is not concluded thereby. Gulf C. & S. F. R. Co. *v.* Trawick (Tex. Feb. 6, 1891), 15 S. W. Rep. 568.

ILLINOIS CENTRAL R. Co.

v.

PETERSON.

(68 Mississippi, 454.)

Carriers of Live Stock—Obligation of Carrier to Lay Out Car.—Where a person hires, at a certain price for the trip, a car of a railroad company in which stock may be fed and watered, and fills such car with horses and "emigrant movables," the contract providing that the shipper shall accompany the car and feed and water and care for the stock, there is no obligation on the part of the company to lay out such car for reloading because one of the horses has got down in the car, since the shipper can, if he chooses, secure delay by abandoning the contract altogether, or by making a new contract for another time.

Federal Statute Providing for Unloading and Feeding Stock—Enforcement in State Courts.—The federal statute (Rev. Stat. U. S. § 4386) providing that animals transported on railroads shall be unloaded and fed at certain intervals, is a statute with the enforcement of which the state courts are in no way concerned,

APPEAL from Hinds Circuit Court.

Action to recover damages for the death of two horses and injury to several others while being transported over defendant's railroad. Judgment for plaintiff. Defendant appeals.

W. P. & J. B. Harris, for appellant.

E. E. Baldwin, for appellee.

WOODS, C. J.—Under the special contract in evidence, and under which the appellee seeks a recovery, the defend-

ant corporation let to appellee an entire car, to be used by him in the transportation of what is denominated "emigrant movables," consisting, in this instance, of six horses and a lot of miscellaneous property,—corn, feed-stuff, furniture, etc. The car was under the charge and in the care of appellee, was loaded by him at his own discretion, and was held in the defendant's yards at Chicago, to meet appellee's wishes, for about three days, in order to permit him to complete his load; and this while the horses were all on the car, they having been loaded at a point 30 miles north of Chicago. The contract stipulated, for the railroad company, against liability on its part, except for injuries resulting from collisions or derailment in transportation. That the railroad limited its liability for wilful injuries or gross negligence is not contended by its counsel. By this special contract the appellee agreed to feed, water, and take care of his stock, and to load and unload the animals, and to exempt the railroad company from loss occurring by jumping from the cars, delay of trains, or any damage the stock might sustain, except such as should result from collisions or derailment of cars in course of transportation. Suitable provision was made for feeding and watering the stock on the car, and they were properly fed and watered by appellee, who accompanied the stock, without further charge than the price paid for the use of the car. After the stock had been loaded and kept confined in the car for nearly three days, the appellee completed his additional loading, and the car was taken in charge by appellant, to be transported on its route to Jackson, Miss. The next day after leaving Chicago appellee discovered that one of the young stallions was down in the car. He got it up, but before reaching Centralia, and about a day after the journey had been begun, the same young animal was found down again, and as was thought by appellee to be down finally, as he expresses it. On reaching Centralia appellee made application to the railroad company's agent to be laid out for 24 hours, to the end that he might rearrange his load, (then plainly seen to have been improperly loaded,) and to rest his stock, which application was not accepted and complied with, though the car of appellee was actually taken out of the train in which it was being carried, and was permitted to lie at Centralia for a few hours,—a time too short, however, as appellee thought, to afford him opportunity to unload, rest his stock, and rearrange the load.

Case stated

The question then, which meets us on the threshold of the case, and whose determination by us may prove conclusive of the entire controversy is, had the appellee the right

to demand that he be laid out at Centralia? If he had this right, how was it acquired? Was it an implied obligation resting upon the railroad? If it finds rest under the contract, it will be found by implication. There is no express obligation of this character appearing on the face of the instrument. If it was an implied obligation on the railroad, how is the implication raised? If it was the custom of the railroad company to lay out cars in which a few horses were carried, then there was an implied obligation assumed to comply with such custom on the part of the railroad. But the undisputed evidence perfectly shows that, while it was the custom to lay out car-load lots of animals every 24 or 28 hours, in order that they might be fed, watered, and cared for, no such custom prevailed or existed in cases where a few animals only were loaded in a car, and where provision was made thereon for watering and feeding the animals. The custom was unknown in cases of the latter character. Nor does the absence of the custom seem unnatural; there being no necessity, apparently, in ordinary cases, for any unloading. The cases referred to by appellee's counsel in Illinois Cent. R. Co. *v.* Adams, 42 Ill. 474, and Toledo, W. & W. R. Co. *v.* Thompson, 71 Ill. 434, raised an implied obligation on the carrier to throw water on hogs crowded in a car, because of the known custom of railroads to so apply water to that particular animal. The other case relied upon by counsel for appellee is that of Kinnick *v.* Chicago R. I. & P. R. Co., 69 Iowa 665, 27 Am. & Eng. R. Cas. 55. In that case the railroad company received a car-load of hogs from plaintiff, and, after loading and starting them on their journey, there was such delay, by reason of the wrecking of another train, that a number of the hogs died; and the court held, as it was a natural propensity of hogs to struggle to get near to or away from the doors of a car, when it is left standing, and to "pile up" on each other in such struggles, and thereby produce injury or death, and as it appeared that the injuries complained of were attributable to the failure of the railroad company to give the animals any attention during the 12 hours during which the train was standing still because of the obstructing wreck, that the company was liable because of its negligence, in this extraordinary danger to the animals, in failing to do what the delay and consequent peril to the animals required should be done. We fail to see any support in any of these cases for the proposition that there was an implied obligation in the case at bar upon the railroad company to lay out the car, which appellee had hired, for 24 hours, at Centralia. The contrary is involved in these

Carrier not compelled to lay out car.

decisions, as we understand them.

In the absence of any custom imposing obligation to lay out on the appellee, what is there in the conduct of the parties to the contract before us which will authorize us to say that any purpose to lay out the car, after it had been started on its way to its destination, was in the minds of the company and the appellee? What is the foundation for implying that the minds of the parties ever dwelt upon or met in any unexpressed agreement that appellee should have such right? We have been unable to find any circumstance, even, which tends to support that proposition. On the other hand, there is much in the evidence of the appellee which strongly shows that he regarded the use of the car as confined to one continuous trip. He placed three horses in each end of the car, and then partitioned both ends in front of the horses, their heads being towards the middle doors of the car. He likewise made stalls for the horses, respectively, within the partitioned spaces, and then he proceeded to fill up the vacant space in the middle of the car with a large quantity of corn and other feed-stuff, household goods, etc. The whole arrangement of the car-load, as made by the appellee, precluded the unloading of the car, unless with much labor and considable time. It is perfectly apparent that neither when the contract was executed nor when the car was loaded was there any thought of having a layout accorded him while on the way, in the mind of appellee himself, even. We fail to find any ground for maintaining that there was any implied obligation, under the contract to give appellee the desired layout.

It is said by counsel for appellee that by §4386, Rev. St. U. S., a definite rule for the transportation of animals is created, and penalties prescribed for disregard of the rule. With this rule and its enforcement the courts of the state are no way concerned. But the act itself, in a subsequent section, provides for the recovery of the penalty in a civil action in the proper federal court. It is waste of words to say more.

Federal statute.

Is there an obligation, founded in common humanity, which required the railroad company to lay out appellee's car, in order that dumb brutes may have relief from suffering and rescue from death? It is not necessary for us to answer. The evidence satisfies us that the appellee did not himself think the stock in the condition indicated in the foregoing question when he made his request at Centralia to be laid out. Surely it cannot be believed that if he then knew, or had reason to know, that very valuable stallions (one of which he had paid $800 for) and valuable mares were in peril of impend-

The injury was the fault of the plaintiff.

ing death or serious injury, self-interest, as well as humanity, would not have constrained him to make a new contract for longer use of his car, or, if necessary, to abandon altogether his then contract with the railroad company, and take the chances of the trifling loss of $60, which he had bound himself to pay the railroad, by then and there unloading his car and leaving the train. It is manifest that by keeping his stock on the car for three days before starting them southward from Chicago, and by so loading the car as to render it impossible to take the stock out without great trouble and delay, the appellee had placed himself in the unfortunate situation which confronted him at Centralia, and from which he could only extricate himself by making a new contract for the use of the car for a longer time than originally thought needful, or by abandoning his contract altogether, and removing his stock from the train. As these views, for the present, appear to cut up by the roots appellee's contention, we find it unnecessary to express any opinion on any other point involved. Reversed and remanded.

Carriage of Live Stock—Duty of Carrier to Unload, Feed, and Water Stock.—See generally note, 42 Am. and Eng. R. Cas. 537; note 45 *Id.* 355; Good *v.* Galveston, H. & S. A. R. Co., 40 *Id.* 98; Kinnick *v.* Chicago, R. I. & P. R. Co. (Iowa) 27 Am. & Eng. R. Cas. 55; Louisville & N. R. Co. *v.* Trent, (Tenn.) 16 Am. & Eng. R. Cas. 170, note 171; Bryant *v.* Southwestern R. Co. (Ga.) 6 Am. & Eng. R. Cas. 388; McAlister *v.* Chicago, R. I. & P. R. Co. (Mo.) 7 *Id.* 373; United States *v.* East Tennessee, V. & G. R. Co. (C. C.) 9 *Id.* 259.

If live stock is transported in cars which are not properly constructed for feeding and watering stock, it is the duty of the carrier to furnish places where the stock may be unloaded, watered, and fed without injury in any kind of weather, under a statute (Rev. Stat. Tex. art. 284) making it the duty of a common carrier of live stock to feed and water the same during the time of conveyance, unless otherwise provided by special contract. International & G. N. R. Co. *v.* McRae, (Tex., Dec. 23, 1891), 18 S. W. Rep. 672. Where the bill of lading stipulates that the shipper is to supply food and water for the stock, it is error to charge that the railroad company is liable if it omitted to give him opportunity therefor, when the evidence shows that no application was made for such opportunity. Mobile & O. R. Co. *v.* Francis, (Miss., May 25, 1891) 9 So. Rep. 508.

The shipper of live stock by railway, under a special contract in which he agrees that, "in case of accidents to or delays of time from any cause whatever, "he" is to feed, water and take proper care of the stock at his own expense," cannot recover damages resulting from his own failure to perform his part of the contract, although the company may have consumed more time than necessary in effecting the transportation. There might be damage from such delay by increasing the expense of the shipper, or by some loss to him in consequence of the change of market value, but the deterioration in the condition of the animals from lack of food, water, and attention would not result from the delay, but from the negligence of the shipper. Boaz *v.* Central R. & D. Co., 87 Ga. 463.

The federal statute (Rev. Stat. U. S. § 4386) providing that no interstate railroad shall confine cattle in cars for a longer period than twenty-

eight hours without unloading the same for rest, water, and feeding, unless prevented from so doing by storm or other accidental cause, was not intended to fix a period during which the company could, without incurring liability, hold cattle without unloading for such purposes. Missouri Pacific R. Co. *v.* Ivy, 79 Tex. 444.

A railroad company, under its contract to transport and deliver certain horses and to store them if not called for, which stipulates that it will not be liable as a common carrier after their arrival at the "place of destination and unlading," that "live animals will only be taken at the owner's risk" during "transportation, loading and unloading, unless specially agreed to the contrary," and that freight "must be taken away within twenty-four hours after being unladen from the cars," is bound to unload the horses, though at the owner's risk, irrespective of a local usage or general regulation of the company requiring consignees to unload live stock. Benson *v.* Gray, 154 Mass. 391.

Statement by Shipper as to Condition of Stock Signed along Route.—In Missouri Pacific R. Co. *v.* Ivy, 79 Tex. 444, it was held that a shipper of live stock is not bound by admissions that the stock was in good condition made in various reports signed by him along the route without reading, on the representations of the conductors presenting them that such reports were only intended to show that there was no accident during the run.

In International & G. N. R. Co. *v.* McRae, (Tex., Dec. 22, 1891) 18 S. W. Rep. 672, it was held that where a railroad company requires the shipper of stock and the conductor of the train, on which it is being transported, to sign a written statement of the condition of the stock, such statement to be attested by a third person, the paper will not be received in evidence unless its execution is proved by the subscribing witness, or the failure to produce such witness is explained.

STATE *ex rel.* IVES, ATTORNEY GENERAL,

v.

KANSAS CENTRAL R. CO., *et al.*

(*Kansas Supreme Court, Dec. 5, 1891.*)

Effect of Recommendation of Railroad Commissioners as to Repairs.—Under the provisions of section 5, chap. 124, Sess. Laws 1883 (paragraph 1328, Gen. St. 1889), an order or recommendation of the board of railroad commissioners of the state to a railroad company, requiring repairs to be made upon its road or track to promote the security, convenience and accommodation of the public, is advisory only. Such an order or recommendation is not final or conclusive upon the railroad company or in the courts.

On the 25th of October, 1891, the state of Kansas, upon the relation of the attorney general, filed its written application in this court, supported by certain affidavits, praying for a peremptory writ of *mandamus* to compel the Kansas Central Railroad Company and the Union Pacific Railway Company to repair at once the Kansas Central Railroad from Leavenworth to Miltonvale, by relaying the same with 56-pound steel rails, in accordance with an order of the board

of railroad commissioners of the state of Kansas. On November 4, 1889, an alternative writ of *mandamus* was allowed and served upon the defendant companies, which recited, among other things: "That the board of railroad commissioners of the state of Kansas having been advised of the condition of the Kansas Central Railroad, and having made a careful examination and inspection of the same, on the 13th of May, 1891, found and determined that said railroad had been and was in an unsafe and dangerous condition for the transportation of persons and property over the same, by reason of the insufficiency, condition and weight of the iron rails in said tracks; that by reason of its condition, the train service in use on like railroads has been abandoned, and that, pursuant to said finding and determination, the said board made its order that the line of said railroad should be repaired from the city of Leavenworth to the town of Miltonvale by the laying of new rails of standard pattern, and of not less than a weight of fifty-six pounds to the lineal yard; that this order was mailed to the vice-president and general manager of the defendant, the Union Pacific Railway Company; that afterwards, on June 9, 1891, said board again wrote said officers concerning said order; that afterwards, on June 16, 1891, said officer was again informed of said order by telegram; that on the last day aforesaid the said officer replied, in substance, that the whole matter had been submitted to those who owned the road from whom said officer received his instruction; that on June 19, 1891, the said board informed said officer that immediate action on his part was expected; that on the 21st day of June, 1891, said officer replied to the said board that he had sent the correspondence to the New York office, where estimates were then being considered, together with his own recommendation, in harmony with the demands of the said board; that on the 16th day of September, 1891, the vice-president and general manager of said defendant applied to said board for a modification of said order; that on the 18th day of September, 1891, the said officer of said defendant again asked for a modification of said order, and the said board again, on September 30th, informed said officer that it would not recede from said order; that said railroad has not been maintained to meet the demands of public obligations; that it has been neglected; that the board further informed him that it would relieve itself of the responsibility to secure action which was then formally refused by said officer; and said officer was advised that the whole matter had been placed in the hands of the governor of the state of Kansas for his action, and that the governor of the state of Kansas,

by his written direction to the attorney general, directed the institution of this suit." On November 5, 1891, the Union Pacific Railway Company filed its motion to quash and set aside the alternative writ, for the reason that it did not state facts sufficient to entitle the plaintiff to the relief sought. This motion was heard on Friday, November 6th, at the November session of the court for 1891.

The powers and duties of the board of railroad commissioners of the state, as prescribed by the statute, so far as necessary to be referred to in the determination of this case, are as follows: "Par. 1328. Said commissioners shall have the general supervision of all railroads in the state operated by steam, and all express companies, sleeping car companies, and all other persons, companies, or corporations doing business as common carriers in this state; and shall inquire into any neglect or violation of the laws of this state by any person, company, or corporation engaged in the business of transportation of persons or property therein, or by the officers, agents, or employes thereof; and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience. Whenever, in the judgment of the railroad commissioners, it shall appear that any railroad corporation, or other transportation company, fails, in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, said commissioners shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioners' secretary, with any station agent, clerk, treasurer, or any director of said corporation; and a report of the proceedings shall be included in the annual report of the commissioners to the Governor. Nothing in this section shall be construed as relieving any railroad company, or other transportation corporation, from their responsibility or liability for damage to person or property." Laws, March 8, 1883, chap. 124, § 5. "Par. 1352. That whenever, in the judgment of the board of railroad commissioners, it is necessary to the convenience or accommodation of the public that two or

more railroads that cross or run parallel with each other should connect at or near the point of crossing or places of business along such railroad, for the transfer of cars from one road to another, the board may require the construction of necessary switch connection between such railroads at the points where deemed necessary, in the following manner: Said board of railroad commissioners shall serve, upon the railroad companies whose road it is deemed necessary to connect, a certified copy of their finding and decision, in which shall be stated the character of connections to be built, whose duty it shall then be to construct such switch connections within such time as the said board shall prescribe, and the expense of the same shall be borne equally by the companies whose roads so connect or run parallel. If one of the said companies shall build the whole of such switch, it may recover one-half of the cost of the same from the company whose duty it was to construct one-half of such switch." Laws 1889, chap. 133, § 1, as amended by Laws 1889, chap. 193, § 1, March 16. "Par. 1355. It shall be the duty of the board of railroad commissioners, upon complaint and application by the mayor and council of any city, or the trustee of any township in this state, requesting an order of said board to require any railroad company in this state to construct any depots, side tracks, switches, or other facilities, at any point on the line of such railroad, for the convenience and safety of the public in the transaction of business with such railroad, and the interchange of business between connecting or parallel railroads at any station, town, or city in this state, to investigate such complaint, after giving proper notice to the railroad companies interested; and said commissioners, after such examination, shall make such orders as they deem necessary and proper in relation to the construction and maintenance of such depots, connections, switches on side tracks, as in the judgment of said board shall be necessary." Laws March 21, 1889, c. 192, § 1. "Par. 1356. If complaint shall be made by any railroad company in this state against any other railroad company in this state on account of failure, neglect, or refusal to comply with the provisions of section nine of an act entitled 'An act concerning railroads and other common carriers,' approved March 6, 1883, the board of railroad commissioners shall, upon notice to said railroad company, investigate such complaint, and thereupon make such order as in the opinion of said board shall be just and reasonable for the public interest, and may fix in such order a reasonable switching charge for any service required by such order, which switching charge shall be paid by the railroad company receiving the service, and shall not be

added to the rate paid by any consignor or consignee interested in such shipment." Laws March 21, 1889, chap. 192, § 2. "Par. 1357. The board of railroad commissioners may enforce its orders for the erection and maintenance of depots, the construction of connections, side tracks and switches, and charges for switching between connecting or parallel lines of railroad, as hereinbefore provided for, as provided in the next section." Laws March 21, 1889, chap. 192, § 3. Section 4, chap. 192, Sess. Laws 1889, provides that for every neglect or refusal of any railroad company, corporation, receiver, or person operating any railroad in this state to comply with any order of the board of railroad commissioners of this state, made in pursuance of the provisions of chap. 192, Sess. Laws 1889, such corporation or person so neglecting or refusing shall forfeit to the state the sum of $100 for each and every day that any such order is neglected or disobeyed after the expiration of thirty days from the day of service of such order. Par. 1358, Gen. Stat. 1889.

J. N. Ives, attorney general, and J. G. Waters, for plaintiff.

A. L. Williams and N. H. Loomis, for defendants.

HORTON, C. J.—The question for our consideration in this case is not what power the legislature of the state may delegate or confer upon the board of railroad commissioners, but what power is conferred by the existing statutes. It is contended upon the part of the state that the finding of the railroad commissioners of the 13th day of May, 1891, that the Kansas Central Railroad "is in an unsafe and dangerous condition for the transportation of persons and property by reason of the insufficient condition and weight of the iron rails in the tracks thereof," is final and conclusive upon the defendants and this court. Further, that the order of the commissioners, requiring the Kansas Central Railroad to be relaid with new rails of standard pattern, and of not less weight than fifty-six pounds to the lineal yard, is also final and conclusive; that in proceedings in this court to compel a compliance with the order of the commissioners, the statute neither contemplates nor allows any issue to be made or inquiry had of the condition of the railroad examined by the commissioners, or of the reasonableness of the order made by them. The defendants claim that the order of the commissioners, under the terms of the statute is advisory only. If the finding of the commissioners and their order is final and conclusive, this court has no power to hear or determine any issue of fact, except upon the allegation that the defendants have refused to comply with the order for repairs. If the finding and order of the commissioners are final and conclusive, this court upon a

Questions presented.

railroad company refusing a compliance therewith, must at once, upon proper application being made, register the order and enforce the same literally.

The power which is claimed by the commissioners to be conferred upon them, so far as this case is concerned, must be found, if found anywhere, in § 5, chap. 124, Sess. Laws 1883 (paragraph 1328, Gen. St. 1889). The legislature has not conferred upon the commissioners by said statute the power claimed. There is nothing in the statute which states, or can be construed to state, that the orders of the commissioners concerning repairs upon a railroad shall be final or conclusive, or that the courts must carry out their determinations or judgments. Upon the other hand, the statute provides only that whenever, in the judgment of the commissioners, any repairs upon a railroad are demanded for the security, convenience and accommodation of the public, they shall inform the railroad corporation of the improvements and changes which they adjudge to be necessary, and then report their proceedings to the governor. Nowhere is it stated in the statute that the recommendations of the commissioners concerning repairs must be complied with *nolens volens* by the company; nor does the statute authorize the governor to carry into execution the order of the commissioners. As to the necessary repairs of a railroad, the finding and order of the commissioners, under the statute, are advisory only. Nothing more. The order cannot be enforced by the commissioners; it cannot be enforced by the governor, and it cannot be enforced specifically by this or any other court. Under the statute, as existing, whenever an action is brought in any court to compel a railroad corporation to repair its tracks or operate its road in a particular way for the security, convenience and accommodation of the public, the corporation is entitled to an opportunity to traverse its alleged violation of duty, and to have a judicial investigation of the charges made against it under the forms provided for in the trial of other civil actions. Not only is the finding and order of the commissioners not an absolute finality, but the statute concerning repairs does not make them even *prima facie* evidence. When the courts are to decide such a case as this, the whole truth of the matter alleged or denied is subject to a judicial investigation. Each party is entitled to its day in court before a conclusive finding is made or a final order entered. The commissioners are not clothed with judicial functions. They have neither the powers of masters, referees, juries or judges. Their findings are not like the findings of a master, referee, jury or court. When performing

Construction of statute—Recommendations not conclusive.

duties under said § 5, chap. 124, Sess. Laws 1883, they may examine and decide what repairs are proper and give notice thereof to the railroad corporation, and report their proceedings to the governor. The statute confers no other duty or power.

The persons first appointed as commissioners were Hon. James Humphrey, Hon. L. L. Turner and Hon. Henry Hopkins. In the first report of the commissioners, their powers under said section 5 were very clearly and fully defined by them. They said: "The commissioners, under this section, have no power to enforce an order. They can simply advise the company in fault of the changes desired or deemed necessary. To have invested the commission with the power to enforce its own orders, it would have been necessary to have changed the character of the board and the scope of its functions and powers. It would have been necessary to have given to the commission all the powers of a court of chancery, to be exercised within the scope of its assigned duties, with such ministerial officers attached to the board as are usual and necessary to such tribunals, to execute its injunctions and mandates. It would have rendered it necessary to have instituted a formal investigation, upon proper complaint and notice to the company complained of, and the rendition of a formal judgment and decree upon the evidence which should be submitted to the board. Manifestly, in such case, it would have been improper for the board to have acted upon knowledge and information, gathered from personal observation, or the *ex parte* statements of individuals, as much so as it would be for regularly organized courts to act judicially upon evidence which has never been disclosed to the opposite party to the suit. The supervisory powers of the commission would in such case extend only to such matters as should be formally brought before it by complaint, and no such complaint would be made until some one had become the suffering victim of some neglect, failure or other violation of duty on the part of a railroad company. Thus the chief benefits which were intended to be secured by giving the commissioners general supervisory powers would be sacrificed by imposing upon them those limitations in the exercise of functions which are necessary to impress upon judicial decrees the weight and character of impartiality." First Annual Report of Railroad Commissioners for 1883, p. 4.

The reports of the commission reviewed.

In 1888 the commissioners were Hon. Albert R. Greene, Hon. Almerin Gillett, and Hon. James Humphrey. They evidently did not understand that their orders were final or

conclusive, and that the courts, under the existing statute, without a full investigation and hearing thereof, are required to enforce their orders. They said: "The orders, decisions, and recommendations of the board, upon the various matters which have come before it the past year, have in nearly all instances been complied with and carried out by the railroad companies affected by such decision or order. In one instance, however, the company affected by a decision of this board has demurred, and so far, we have been advised, has refused to comply with its requirements. * * * It is respectfully recommended that provision be made by statute for the enforcement, by appropriate remedy, in courts having jurisdiction, of the decisions and orders of the board." Sixth Annual Report of Railroad Commissioners for 1888, pages 45, 46.

In compliance with the foregoing request, the legislature passed an act on the 2d of March, 1889, attempting to compel the enforcement of the orders of railroad commissioners for the erection and maintenance of depots, the construction of connections, side tracks, switches, etc.; but the act of March 2, 1889, does not attempt to confer any additional power upon the commissioners or the courts in enforcing their orders concerning the repairs, or the actual operation of railroads.

In 1890 the commissioners were Hon. James Humphrey, Hon. George T. Anthony, and Hon. Albert R. Green. In their report they also asked for additional power. They said: "It should be provided by law that the order of the railroad commissioners shall be the governing law of the railroad companies, to be obeyed and respected by them, until vacated by a competent judicial tribunal on appeal." Eighth Annual Report of the Railroad Commissioners for 1890, page 10. No additional power was conferred at the session of the legislature for 1891. Therefore, as before stated, the only act that it is necessary to construe in this case is § 5, chap. 124, Sess. Laws 1883, (paragraph 1328, Gen. St. 1889).

Intention of the legislature.

When the legislature of 1889 gave additional powers to the commissioners concerning railroad stations, connections, side tracks, switches, etc., but refused to change the enforcement of the recommendations of the commissioners concerning the necessary repairs, etc., of railroad tracks, it is clearly evident that the members thereof did not think the order of the commissioners in such matters should be an absolute finality, or should be enforced without the ordinary judicial investigations in the courts. The counsel representing the state in this case, upon the hearing thereof, made a very able argument to

establish that, within the police power, the state has ample authority to compel the repairs of any railroad, so that it may be operated safely for the public. This argument although strong and ingenious, cannot be applied here, be cause the legislature has not, by statute, conferred, or attempted to confer, the power claimed, even if it had authority so to do. It will be noticed, however, by the language of said section 5, that the power of the commissioners is as effective in matters relating to the convenience and accommodation of the public as to those having reference to security or safety. In Minnesota, in 1887, the legislature granted by statute to the railroad commissioners of that state the power to fix the rates of charges for the transportation of property by railroad companies, and provided their orders should be final and conclusive. This statute was held by the supreme court of the United States in conflict with the constitution of the United States, and therefore void. Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285. It is an historical fact, well known by those who attended the session of the legislature of 1883, and by those acquainted with the proceedings of that body, that there was a bitter contention among its members as to what power should be conferred upon or delegated to the commissioners to be appointed under the act or bill then pending for adoption. A part of the members, under the lead of Hon. Eugene F. Ware and others, were favorable to the delegation to the commissioners and the court's full authority for the enforcement of their orders; others, and a majority, opposed the delegation of such power; and the result was that advisory action only on the part of the commissioners was provided for.

The national interstate commerce act of February 4, 1887, differs widely from the act of 1883 of our legislature, in expressly providing for writs of *mandamus* to be issued out of the United States circuit courts to compel railroad companies to comply with the orders of the national commission, and also for punishing in such courts railroad companies for violating or neglecting to obey any lawful order or requirement of the national commission. Volume 1, Interstate Commerce Commission Reports, 665–671.

The interstate commerce act.

We understand that generally the recommendations of the state commissioners have been complied with by all of the railroad companies affected thereby, and, if the road and track of the Kansas Central are in the dangerous condition reported by the commissioners, it is most unfortunate to the public that the corporation

Mandamus refused.

having the operation of the road has not long since carried out the requests of the commissioners, so as to put the road and track in a safe and secure condition for the transportation of freight and the carrying of passengers; but when we are called upon to perform a judicial duty we cannot go beyond the limits of our power as defined by the constitution and statutes of the state, however strong the necessity may be apparent for the immediate exercise of arbitrary control. Without deciding other questions raised upon the argument, the motion to quash must be sustained, because the legislature has not provided, or attempted to provide, that the recommendations of the railroad commissioners concerning the repairs of railroads, their tracks, etc., are an absolute finality. The plaintiffs will have leave to amend the alternative writ, if they so desire, by setting forth all allegations necessary of the dangerous condition of the track or roadbed of the Kansas Central Railroad Company; its refusal to operate its road safely or securely; and its neglect of duty, if any, in any other matters; and also to ask for such orders in the premises as may be deemed proper. Issues may be joined thereon, as in other *mandamus* cases, and an investigation will be judicially had of the truth of the matters in controversy. What power this court may lawfully exercise in compelling necessary repairs upon a railroad, or in requiring the safe operation of such a road, we leave for future consideration. All the justices concurring.

Effect of Recommendations of State Railroad Commissioners—Enforcement of Findings by the Courts.—Under the New York statute providing a board of railroad commissioners, the findings and recommendations of commissioners are not enforceable in the courts as a judgment; they are not even a command, if they affect the railroad company at all; they are advice merely. The New York law in this respect is much the same as it is in Kansas, as determined by the above case. Thus it has been held in New York that a recommendation by the railroad commissioners of a railroad company to establish a station at a particular place cannot be enforced in the courts. People *v.* New York, L. E. & W. R. Co., 104 N. Y. 58, 29 Am. & Eng. R. Cas. 480. In Nebraska and Oregon, however whenever a railroad company violates or refuses or neglects to obey any lawful order or requirement of the commission, the commission or any company or person interested may enter a complaint in the courts and the courts may, in the proper cases, issue a writ of injunction or other proper process to restrain the company from further continuing such stipulation or disobedience. Board of Railroad Commissioners *v.* Oregon R. & Nav. R. Co., 17 Ore. 65, 35 Am. & Eng. R. Cas. 542; State *v.* Fremont, R. & M. V. R. Co., 22 Neb. 313, 32 Am. & Eng. R. Cas. 426. And in Connecticut the law makes the order of the railroad commissioners effectual by authorizing its enforcement. State *v.* New Haven & N. R. Co., 37 Conn. 153. See also Woodruff *v.* New York & N. E. R. Co., 59 Conn. 63.

In Iowa, the statute (Laws 1884 chap. 133) empowers the courts to enforce only such orders as are reasonable and just. State *v.* Des Moines & Ft. D. R. Co. *post*, p. 184. And in Georgia, Florida and Misissippi, ade-

quate penalties are provided for the enforcement of the rules and orders of the commission. Georgia R. & B. Co. *v.* Smith, 70 Ga. 694, 9 Am. & Eng. R. Cas. 387; McWhorter *v.* Pensacola & A. R. Co., 24 Fla. 417, 37 Am. & Eng. Cas. 566; Stone *v.* Farmer's L. & T. Co., 116 U. S. 307, 23 Am. & Eng. R. Cas. 577. The Minnesota courts have held that the orders of the commission of that state are conclusive and not subject to review by the court upon proceedings taken for their enforcement. State *v.* Chicago, M. & St. P. R. Co., 38 Minn. 281; Railroad Transfer Co. *v.* Railroad, etc., Commission, 39 Minn. 231; State *v.* Minneapolis, Eastern R. Co., 40 Minn. 156.

The Tennessee act of 1883 was held to be invalid because it left to the railroad commission the power to determine whether the statute had been violated and to prosecute suit accordingly. Louisville & N. R. Co. *v.* Railroad Commission, 19 Fed. Rep. 679, 16 Am. & Eng. R. Cas. 1.

STATE

v.

DES MOINES & FORT DODGE R. CO. *et al.*

(*Iowa Supreme Court, January 30, 1892.*)

Railroad Commissioners—Enforcement of Orders by Courts—Reasonableness or Justness of Order.—The Iowa act of 1884, chap. 133, contemplates that only such orders of the railroad commissioners as are reasonable and just shall be enforced by the courts. It does not contemplate that in all cases the reasonableness and justness of the commissioner's orders should be found by judicial determination, but only such as are violated. In order to enforce an order at the instance of the commissioners by a decree of the court, the court and the commissioners must concur in a finding of the facts. The law makes such a proceeding an equitable one, and the reasonableness or justness of the order, based upon the facts found, is to be determined from equitable considerations.

Abandonment of Track—Operation of Leased Line—Order of Commissioners Compelling Company to Rebuild.—Where the facts show that the public will be as advantageously served by a train service of a railroad company over a leased line between two points, as it would be by a service over a line of its own, which the company has abandoned, the leased line being but a few feet from the old line, and it appearing that the expense of rebuilding and operating the old line would be very heavy and would be without practical advantage to any one, the court will refuse to enforce an order of the railroad commissioners compelling the company to rebuild and operate its abandoned line, since such an order is unreasonable and unjust within the meaning of the statute.

Same—Effect of Prior Land Grant.—It cannot be said that there is any legal obligation of a railroad company to operate its trains on its own line rather than on a leased one, if the public are served equally well, although the company has received a land grant from the state in consideration of its completing the line which it has abandoned. The receipt of such aid from the state does not take away from the company its right to make such changes in its line as its interests might dictate, by placing its train service for some parts of the way on a leased line of another company, providing that such a service is maintained as was contemplated when its obligation to the public was assumed.

Same—Expiration of Lease—Statute of Limitations.—The fact that the lease of the track operated will soon expire, and that it contains no provisions for a renewal, will not warrant the enforcement of the order to rebuild the abandoned track; nor can such an order be sustained on the ground that a further delay might cause the statute of limitations to run in favor of the company, since no cause of action has yet arisen against it.

Same—Order Requiring Operation of Through Trains Pending Work of Rebuilding.—An order of the commissioners requiring the company to operate through trains over the leased line, pending the completion of the work of rebuilding the abandoned line, will not be enforced, since the court has decided that the order compelling the rebuilding of the abandoned line should not be enforced, and the matter of future train service is left to the further inquiry and direction of the commissioners.

APPEAL from Webster District Court.

Action in equity to enforce certain orders of the board of railway commissioners for the rebuilding of a line of road into the city of Ft. Dodge, and the operation of trains into the city. The facts appear in the decree of the district court as follows:

"That in the year 1858 the state of Iowa granted to the Keokuk, Ft. Des Moines & Minnesota Railroad Company certain lands to aid in the construction of a railroad from Keokuk, up and along the valley of the Des Moines river, by way of the city of Des Moines, to the northern line of the state; that the road was to be built in a continuous line above Bentonsport, and the grant was made subject to certain conditions as to the time of completion, etc.; that, these conditions not being complied with, the legislature, in 1864 (chap. 108, 10th Gen. Assem.), passed an act describing specifically how the grant should be earned, and directing the setting apart of one-fourth in value of the lands, to be applied in the construction of said railroad from Des Moines to Ft. Dodge; that in 1868, the company being again in default, the legislature (chap. 57, 12th Gen. Assem.) extended the time to 1870, and set apart 100,000 acres of the land, to be 'held and applied exclusively' to the construction of the road above Des Moines, and to be certified to the company 'only upon completion of said road into the town of Ft. Dodge, upon the east side of the Des Moines river, in 1870, which said company agrees to do;' that there were at a later date negotiations between the railroad company and the citizens of Ft. Dodge which resulted in an agreement by which the road was to be built into the city on the east side of the river, and thence north towards its projected northern terminus, in consideration of which tax aid was to be voted, right of way and depot grounds furnished, and a certain amount of stock subscribed; that the tax was voted, and the right of way and depot ground, in whole or in part, were

furnished, to the Ft. Dodge station, but, the road never being extended northward from the city, the tax was not collected; that the city of Ft. Dodge, by ordinance, appropriated and paid $1,500, either directly for the right of way and station grounds in the city, or with that sum reimbursed the citizens who advanced such payment in the first instance; that immediately after the act of 1858 the railway company by its board of directors, formally accepted the grant, under the conditions named in the act, and in like manner assented to and accepted the provisions of the subsequent acts on that subject; that, when the road in its construction had reached the latitude of Ft. Dodge, it could only be brought into that city by a deflection from its course to the eastward, at nearly right angles, a distance of some six miles; that at the point where this deflection began a station called 'Tara' was established; that this point was about a mile south of the track of the Iowa Falls & Sioux City Railroad, which is built east and west through Ft. Dodge; that, going easterly, the two lines of road converged, and for a distance of three or four miles ran side by side through a ravine, to the river, which they crossed into the city, each upon its own bridge; that upon reaching the east bank of the river the defendant road ran some half mile further to its own depot; that the road was thus completed in 1870, and the chief engineer and president of the company separately certified to the governor 'that the Des Moines Valley Railroad was completed into Ft. Dodge, on the east side of the Des Moines river,' and was running its trains 'into said town over the bridge and track constructed and owned by said company;' that on these certificates the company demanded and received the 100,000 acres of land set apart for this purpose, making an aggregate of about a half million acres received by it under this grant; that three or four years later a mortgage was foreclosed upon the road, and a new organization to acquire and operate the line north of Des Moines was effected; that the new company thus organized is the Des Moines & Ft. Dodge Railroad Company, a defendant in this case; that its articles of incorporation, as then adopted and as amended in 1881, declare its object to be 'the acquisition, maintaining and operating of a railroad from the city of Des Moines to some point in the city of Ft. Dodge, and any extension thereof which may hereafter be built or acquired.'

"That thereafter the road was operated by the last-named company until 1887, when it was leased to its co-defendant, the Chicago, Rock Island & Pacific Railroad Company; that the terms of this lease provide that lessee shall keep the road in repair, but shall not be held to make any permanent im-

provements; that beginning in September, 1878, the Des Moines & Ft. Dodge Company tore up and dismantled its track from a point east of Tara, where its right of way intersected that of the Iowa Fall & Sioux City Railroad Company, to the east bank of the Des Moines river, and thereafter between these points operated its trains over the said Iowa Falls & Sioux City track, under a lease from the Illinois Central Company, then in control of the latter; that this lease expired in 1887, when it was renewed to expire in 1892, and contains no stipulation for extension or renewal; that in 1881 the Des Moines & Ft. Dodge Company built a branch or extension of its road from Tara northward to Ruthven, whereupon the station then known as 'Tara' was abandoned, and a new one by that name established at the junction with the track of the Iowa Falls & Sioux City road; that, soon after this junction was effected, the remainder of the track between the old station of Tara and the portion dismantled in 1878, was also abandoned, since which the defendants have used the Iowa Falls and Sioux City track for all business between said junction and the east bank of the Des Moines river, a distance of nearly six miles; that for some time after the Chicago, Rock Island & Pacific Company took charge of the road trains continued to be run and operated between Des Moines and Ft. Dodge without break or transfer at Tara; that now all trains are operated between Des Moines and Ruthven as the "through' or 'main' line, and communication is kept up with Ft. Dodge only by a local train plying between that town and Tara over the leased track; that this necessitates the transfer of all Ft. Dodge passengers and all freight in less than car-load quantities, at the junction; that since the building of the Minneapolis & St. Louis south through Ft. Dodge, to a junction with the defendant road at Angus, and the building of the Tara extension northward to Ruthven, there has been wanting that active effort on the part of the defendant to compete for and accommodate business between Ft. Dodge and points beyond Angus on the south and Ruthven on the north, and that for a time there was an effort made by defendant's officers and agents to divert such business to the Minneapolis & St. Louis route.

"That since 1881 the train service over the defendant road has been such that the people of Ft. Dodge very generally feel that they have been deprived of benefits and advantages which they have a right to expect and demand under the circumstances; that in August, 1888, this dissatisfaction culminated in the lodgment of a complaint before the railway commission, asking an order di-

recting the defendant to rebuild and restore its track, and to reform its train service for Ft. Dodge; that upon this complaint the commission, on May 3, 1889, made and entered the following order: 'This case coming up for hearing on an application for an order to enforce the finding of the commissioners in the original hearing, the parties hereto being represented by counsel, it is ordered and adjudged that the defendant the Des Moines & Ft. Dodge Railway Company rebuild and restore its road between Tara station and Ft. Dodge, by restoring the road-bed, replacing the bridges, and relaying its track in a proper manner; that said defendant enter upon the work of construction of said portion of its road not later than June 15, 1889, and complete the same by the 1st day of November following; that, pending the completion of such work, the respondent the Chicago, Rock Island & Pacific Railroad Company, lessee of the Des Moines & Ft. Dodge Railroad, be required and directed to operate one passenger train a day each way between Ft. Dodge and Des Moines, and one freight train, with passenger accommodations, a day each way between Ft. Dodge and Des Moines, and that in the operation of such trains that the time-tables thereof be so adjusted as to best accommodate the business of the entire line and all the stations thereon;' that, defendants having refused to obey the order, this suit was instituted by the attorney general, in the name of the state, to enforce compliance.

"And the court finds that the board of railroad commissioners had jurisdiction upon said complaint to determine whether the defendants are in duty bound to restore and maintain their road into Ft. Dodge, as a question involving alleged violation of charter and statute obligations affecting public right; that the defendant the Des Moines & Ft. Dodge Railroad Company is in duty bound to maintain its road into Ft. Dodge as a continuous, unbroken line by obligations of contract as well as by the ordinary obligations of charter; that the order of the board of railroad commissioners which is above set out is reasonable and just, and that the defendants in refusing compliance therewith are failing in and omitting the performance of public duties and obligations resting upon them; that said order is sufficiently definite and certain to entitle plaintiff to invoke the powers of the court of equity for its enforcement; that the proceeding before the railroad commission was commenced within ten years from the first abandonment of the road; that the state of Iowa is the real party in interest as plaintiff, and is not barred or estopped, by the lapse of time since the road was abandoned, to bring this proceed-

ing, and the statute of limitations does not apply to this action; that plaintiff has not been guilty of laches such as will estop it from maintaining this action.

"It is therefore hereby considered, ordered, and adjudged by the court that the defendant the Des Moines & Fort Dodge Railroad Company rebuild and restore its road between Tara station and Ft. Dodge; that defendant may elect whether it will rebuild upon the old road-bed, either in whole or in part; also whether it will construct the restored line from the present station of Tara junction, or from any convenient point south of said junction; that, whatever point may be selected as the place of divergence towards the city of Ft. Dodge, the tracks of the present line and of the restored line shall be so united as together to form a continuous and unbroken railroad between Des Moines and Ft. Dodge, necessitating no change or transfer of passengers or freight; that, subject to the requirement that the restored road shall be as well built and of equally as good material as the rest of defendant's line on either side thereof, defendant may exercise its own option in the choice of material and manner of construction; that, in strength and safety, the bridges shall comply with the standards recognized by skilled engineers, as sufficient for the purpose for which they are required, but the material, whether wood, iron, or stone, and the style or model to be adopted, shall be at defendant's option; that the work of restoration shall be completed on or before August 15, 1892. And it is further considered, ordered, adjudged, and decreed by the court that the defendant the Chicago, Rock Island & Pacific Railroad Company operate its trains as follows: Beginning within thirty days from this date, and continuing so long as it shall remain in the control and operation of the Des Moines & Ft. Dodge Railroad Company's road, or until the further order of the railroad commissioners, to-wit; It shall operate and run daily (Sundays excepted) one passenger train each way, and one freight train, with ordinary passenger accommodations, each way between Des Moines and Ft. Dodge, without break or transfer at Tara. The leaving time of the two through trains departing from Ft. Dodge shall not be less than three hours apart, and the time of arrival of the through trains from Des Moines shall not be less than three hours apart; subject to these restrictions, the time-table may be arranged by the said defendant in such manner as in its judgment will best conduce to the prompt and efficient transaction of the business of the road. The order above made shall not be construed to forbid the combining of the cars from the south-bound trains from Ruthven and Ft. Dodge into a

single train at Tara, for the remainder of the trip to Des Moines, nor to forbid the separation at Tara of trains from Des Moines into sections for Ft. Dodge and Ruthven, respectively. Such arrangement shall not, however, be allowed to cause any unreasonable or unnecessary delay of passengers or freight. It is further ordered, adjudged, and decreed by the court that a peremptory writ of *mandamus*, or mandatory writ of injunction, issue to the defendants as prayed in the petition, and in conformity with this decree."

The defendant companies each appealed from the judgment thus entered against it.

T. S. Wright and *John F. Duncombe*, for appellants.

John Y. Stone, Atty. Gen., *Healey & Healey*, *R. M. Wright* and *Frank Farrell*, for the State.

GRANGER, J.—1. The consideration of the case involves findings of fact as well as the determination of questions of law. It is important to have in mind the precise character of the litigation before us, and the legislation by which it is authorized. The orders of the railway commissioners which this action is brought to enforce are two: (1) That the Des Moines and Ft. Dodge Railroad Company shall rebuild and restore its road between Tara station and Ft. Dodge; and (2) that the Chicago, Rock Island & Pacific Railway Company shall, pending the completion of the work of the Des Moines & Ft. Dodge Company, operate trains as directed. The record presents separate questions as to the validity of these orders, and that as to the rebuilding of the road will be noticed first.

Orders of the commission.

The district court found "that the order of the board of railroad commissioners * * * is reasonable and just, and that the defendants in refusing compliance therewith are failing in and omitting the performance of public duties and obligations resting upon them." The act of the legislature giving to the court "power to enforce" such orders is chapter 133, Laws 1884, and it provides: "If the court shall find that such a rule, regulation or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction, compelling obedience to and compliance with such rule, order, or regulation, * * * and may grant such other relief as may be deemed just and and proper." The act also provides that the proceeding for the enforcement of such order "shall be by equitable action, in the name of the state of Iowa, and shall be instituted by

Only reasonable and just order may be enforced.

the attorney general whenever advised by the board of railroad commissioners that any railway corporation * * * is violating and refusing to comply with any rule, order, or regulation made by such board," etc. It is insisted by appellants that the finding of the district court that the order for the rebuilding of the road is reasonable and just cannot be sustained from the record, but that, on the contrary, it appears therefrom that such order is unreasonable and unjust. The statute clearly contemplates that only such orders as are reasonable and just shall be enforced. It does not contemplate that in all cases the reasonableness and justness of such orders should be found by judicial determination of the courts, but only such as are violated, and then at the instance of the commissioners. Thus if the commissioners refused to make an order, or when an order is made by them and observed by the company, its reasonableness or justness cannot be made a matter of investigation by the courts. It thus quite conclusively appears that, in so far as the public are concerned, the judgment of the commissioners is conclusive as to orders and regulations. This thought as to the legal significance of the statute is of force in connection with the findings of fact by the commissioners which we think to be of great, if not of controlling, importance on this branch of the case. They find that the cost of rebuilding the road will be about $65,000, and that of maintaining it thereafter about $7,000 per annum, and say that it is very considerable, compared with the traffic over this piece of line. They further say: "The leased road from Ft. Dodge to Tara may be so operated that the advantages, so far as train services are concerned, that would accrue to Ft. Dodge would be as fully realized as if this part of the track was rebuilt on its own line. * * * The rebuilding of the six miles from Tara to Ft. Dodge, while we think it can be legally required, as before stated, would be a burden on the railroad company, without corresponding benefits to the citizens of Ft. Dodge: provided, always, that adequate train service is afforded over the leased line, which can apparently be done, under the terms of the lease."

So far, then, as the facts are concerned, the commissioners find that the public may be as advantageously served by a train service over the leased line as it would be by a service over the line if rebuilt, and in this finding, from our examination of the record, we fully concur. If, upon the facts thus found by the commissioners, they had refused the application for an order to rebuild the line of road, because to so order would have been unreasonable or unjust, the law would not permit the court to ques-

Findings of facts.

tion the correctness of such a finding of fact, nor to disturb the order based thereon. But the law would permit the court to, in effect, refuse an order to rebuild by refusing to enforce it, if in its judgment the order was unreasonable or unjust ,and hence to enforce such an order by a decree of the court, the court and the commissioners should concur in a finding of such facts; for it would indeed be a strange state of the law were we to hold that, without such facts, the commissioners could make the order, but that the courts, because of the absence of such facts, should refuse to enforce it.

Obligation of company to maintain its line.

Looking again to the record of the commissioners, and we find that the order for rebuilding the road is based entirely on a naked legal obligation of the company to operate its trains on its own line, rather than a leased one; for they say: "The Des Moines & Ft. Dodge was organized, among other things, to maintain and operate, not to lease, a line of road from Des Moines to Ft. Dodge. It does not seem to the commissioners that the leasing of part of the line, and abandoning their own line, is compliance with the laws of 1868, or with the purpose of the organization; and on this proposition they distinctly hold that this proposition of complaint is sustained, and that the defendant the Des Moines & Ft. Dodge Railroad is legally bound to maintain and operate a line of road lying between Ft. Dodge and Tara."

Effect of land grant.

It will clearly be seen that the commissioners have based their conclusion in granting the order entirely on a belief that the old road must be maintained as to trackage, for the operation of trains, as it must have been to entitle the company to the grant of lands. But we do not think that such a conclusion necessarily follows. Conceding the rule that, to obtain the land, the company must both construct the road and operate its trains thereon into Ft. Dodge, it does not follow that there may not afterwards be such a change of circumstances that equity would not compel the maintenance of the particular track, or the rebuilding of it if abandoned.

Orders unreasonable and unjust.

So long as the citizens of Ft. Dodge, or perhaps the public, receive a train service between Des Moines and Ft. Dodge with the advantages it would have over the line if rebuilt, what are the grounds of complaint? The company or its lessee is giving the train service to which the public is entitled, or maintains the facilities for giving such a service, as fully as it could do with the road as originally built; and, in legal contemplation, it is maintaining and operating its line be-

tween the two cities. With the line rebuilt, the sufficiency of the service would be a question for the commissioners, and we fail to see wherein it is less so with the leased line on which it now operates its trains under the terms of its lease, there being no limitation as to the number of such trains. What, then, are the results to follow the rebuilding of the road, if we enforce the order? It is alone the expenditure of $65,000, and an additional expenditure of $7,000 annually for its maintenance. With this expenditure, as both the commissioners and ourselves find, no advantage could result to the citizens of Ft. Dodge.

The law in terms makes this proceeding an equitable one, and the reasonableness or justness of an order based on such a state of facts is to be determined from equitable considerations. If the order is enforced, it is, as to its legal bearings, the equivalent of a decree for specific performance of a contract or obligation, and equity does not lend its aid to enforce such a performance where the party seeking enforcement is not injured or prejudiced by the neglect. It is under such circumstances that specific performance becomes oppressive, and is in the proper exercise of a discretionary power refused by the courts.

Equitable considerations.

A case quite in point is that of Chicago & A. R.Co. *v.* Schoeneman, 90 Ill. 258, where this language is used: "Conceding the abstract right of appellees, it does not follow that a specific performance must be decreed. It is a settled principle that a specific performance of a contract is not to be decreed as a matter of course because a legal contract is shown to exist, but it rests entirely in the discretion of the court, upon a view of all the circumstances." The case cites Frisby *v.* Ballance, 4 Scam. (Ill.), 287; McCabe *v.* Crosier, 69 Ill. 501; Seymour *v.* Delancy, 6 Johns. Ch. (N. Y.) 222. It is further said in the opinion: "The effect of a specific performance, so far as now seen, would be to impose upon appellants a large burden of expense, without any practical benefit to appellees. It resting in a sound judicial discretion, it strikes us as a proper exercise of discretion for a court of equity to refuse its interference by way of a decree of specific performance to secure such a result." The supreme court of the United States in Willard *v.* Tayloe, 8 Wall. (U. S.) 557, has said: "In general, it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by

the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect." Very many authorities are to the same effect, and we know of none announcing a contrary doctrine.

Service on leased line is sufficient.

The facts, then, are that a line of road is being maintained from Des Moines to Ft. Dodge, and much of the way between Tara junction and Ft. Dodge, but a few feet from the old line, with such facilities for an adequate train service as could be required over the line sought to be replaced; and we think that so long as the defendants preserve such facilities, and in a way to be as amenable to the laws of the state for the regulation of its service as the line if restored would be, to require an expenditure of $65,000 to replace the line, without a practical advantage to any one, would be unreasonable and unjust, and that the law in a proceeding of this character does not demand it. Nothing in the original undertaking to construct the road and receive the lands and other aid indicates in any way that the company would not afterwards have the right to make such changes as its interest might dictate, by placing its train service for some parts of the way on a line either purchased or leased, provided, always, that such a service is maintained as was contemplated when its obligation to the public was assumed.

These considerations are with a view of the law that the defendant company is not released from an obligation to maintain a road and operate trains, in conformity to its original undertaking, between Des Moines and Ft. Dodge, and we think the present controversy is more over the manner than the fact of its doing so. If, instead of leasing from the Illinois Central Company trackage for its trains, the defendant company had maintained the line in question, and had made a like lease to the Illinois Central, so that the two companies would have operated this abandoned line as they do now the Illinois Central line, it would not be questioned but that it was maintaining its line in harmony with its obligation. Under such a state of facts, the sufficiency of the train service would be a question for the commissioners. The legal situation would hardly be different if the defendant company had, instead of leasing, purchased from the Illinois Central this short line, but a few feet distant most of the way from its own, and then given to the Illinois Central Company a trackage lease like the one now held by the defendant company, provided in so doing it retained such a use of the line as would permit a train service in accord with its obligation to the public. The present situation as to results to the

public is not different from the supposed cases. If we look to the substance rather than the shadow, or if we have in view the fruits that the public may properly derive from its undertaking with the defendant company rather than the imposition of a useless burden, we have the key to an equitable solution of the question before us. Equity will, with a jealous care, protect the former. It will turn aside, as unworthy of its protection, the applicant with no other claim than the latter.

Some importance is attached to the fact that the lease with the Illinois Central Railway Company will expire in 1892, and there is no assurance of a continued service beyond that time. Inasmuch as a line for the operation of trains has been so far supplied, we do not think an order to rebuild could be justified by an assumption that it will not be supplied in the future. We may rather assume that, if other facilities fail, a line will be constructed. Apprehensions are also expressed that a delay may involve a question of the action to restore the road being barred by the statute of limitations. As we hold that no cause of action has yet arisen, because of a line being in effect maintained, there would seem no difficulty in that respect.

Expiration of lease—statute of limitation.

2. The order of the commissioners also required the Chicago, Rock Island & Pacific Railway Company, as lessee of the Des Moines & Ft. Dodge Railway Company, "to operate one passenger train a day each way between Ft. Dodge and Des Moines, and one freight train, with passenger accommodations, a day each way from Ft. Dodge to Des Moines; and that in the operation of such train that the time-table thereof be so adjusted as to best accommodate the business of the whole line, and all stations thereon." The order of the commissioners was that it should be observed "pending the completion" of the work of rebuilding the line, which was ordered to be completed by November 1, 1889. The decree of the district court was entered in March, 1890, and in some quite important particulars modified the order of the commissioners to make it more definite. The authority of the district court to make such changes is strenuously denied by appellants, and the correctness of the proposition thus tendered involves the determination of a question of much difficulty, in view of the different provisions of the statute on the subject of railroad control or regulation: and, inasmuch as the order, as to the operation of trains, appears to be incidental to that for the construction of the line, and was by the commissioners' order to be, in effect, only during the work of

Order for train service.

construction, which, under the judgment of this court, is not to occur, we think this order should also be treated as of no force, and the matter of future train service on the line to be left to further inquiry and direction by the commissioners. The judgment of the district court is reversed.

Enforcement of the Orders of Railroad Commissioners by the Courts—See *ante*, State *v.* Kansas Central R. Co. and note pp. 174, 183.

BONAPARTE

v.

BALTIMORE, HAMPDEN & LAKE ROLAND R. CO. *et al.*

(*Maryland Court of Appeals, February 17, 1892*).

Incorporation of Railroad Company—Laches in Accepting Charter—Forfeiture—Reasonable Time.—Where an act, providing for the incorporation of a railroad company, names commissioners to take subscriptions to the capital stock and requires the road to be commenced within three years from the passage of the act and completed within ten years, the charter will be considered to have been forfeited and the company to have no legal existence, where the commissioners do not begin taking subscriptions to the stock until nearly ten years after the lapse of the time within which the road was to be constructed. The act of the commissioners in taking subscriptions to stock after such a lapse of time is void, and the construction of the railroad by the alleged corporation will be enjoined.

ROBINSON, BRYAN & FOWLER, J. J., dissenting.

APPEAL from Baltimore Circuit Court.

Bill to enjoin the construction of defendant company's road. From an order denying the injunction, plaintiff appeals.

C. J. Bonaparte, Wm. Reynolds, and *Wm. S. Keech*, for appellant.

F. C. Slingluff and *Steele, Semmes & Carry*, for appellees.

IRVING, J.—By chapter 284 of the acts of the general assembly of 1872 was passed the act entitled "An act to incorporate the Baltimore, Hampden & Lake Roland Railroad Company." The first section of the act names certain persons as commissioners to take subscriptions to the capital stock of the company, and, in case of the death, resignation, or refusal to serve of any of the persons named as commissioners, a majority of the remaining commissioners were given authority to appoint others. By the second section of the act the subscribers to the stock, and their successors and assigns, are declared incorporated into a company by the name of "Baltimore, Hampden & Lake

Case stated.

Roland Railroad Company," with perpetual succession under that name, with power of holding, purchasing, and incumbering property for the purposes of the corporation. The third section makes the capital stock of the company to consist of shares, not exceeding 2,000 in number, of the value of $50 per share, $5 of which was to be paid at the time of subscription and the residue in such installments as the president and directors should determine. By the fourth section, as soon as 500 shares should be subscribed, the commissioners to take the subscriptions were authorized, by publishing notice as prescribed, to call a meeting for the election of seven directors, who, on being elected, should elect a president, for whose qualification the fifth section provides. The sixth section gives the company thus incorporated power to construct a railroad with one or two tracks, and necessary sidings, for the transportation of travelers or freight by horse power, and gives the company the exclusive use of any streets or county roads over which they may wish to lay their tracks between Boundary Avenue and Lake Roland: provided said track or tracks are constructed in such manner as not to interfere with the travel over said streets or roads. The seventh section provides for the condemnation of right of way, and estimating damages and benefits. The eighth section prescribes the rate of fare, not exceeding five cents per mile, or for the fraction of one. The ninth section authorizes the borrowing of money to the extent of $25,000. The tenth authorizes the making of bylaws, rules and regulations, and the appointment and employment of officers. The eleventh section provides "that said company shall commence said railway within three years from the passage of the act, and complete the same in ten years." By the twelfth and last section the act is made to go into effect upon its passage, and the right to alter, amend, or repeal is reserved to the legislature. The appellant is a property owner residing on Roland avenue, which is opened as a public avenue or highway of the width of 60 feet, part of his property, and has filed his bill for an injunction restraining the appellees from the construction of their road, which has been begun. He charges that the tearing up and obstruction of the avenue as is proposed is without lawful authority, and will be an unlawful obstruction of the appellant in going to and from his premises. He avers that what is being done is not for the purpose of using horses for the road, but with the design of using electricity as a method of propulsion. He sets up in his bill, and contends in argument, that the act of assembly, relied on by the appellees as an act of incorporation, is void, because it is in conflict with the provisions of article

3, § 48, of the constitution, which prohibits the granting of charters to corporations when there is a general law under which they may be formed, as appellant contends that there is; (2) that it was not accepted in time to confer on the corporation the powers which are claimed for it, or to create a corporation at all; and (3) that if originally accepted in time, the charter gives no right to the corporation to lay down their tracks in the highway without the consent of the county commissioners, which has not been obtained. The appellees deny all those several propositions, and the court below agreed with the appellees in reference to them, and refused the preliminary injunction which was asked, and from that refusal this appeal was taken.

The appellees have moved to dismiss the appeal because it is contended that this particular case does not fall within the provisions of § 29 of article 5 of the Code. When the bill was filed, and preliminary injunction was asked for, instead of granting the injunction at once, and outright, the judge set a day for hearing, and, until that hearing could be had, the judge passed a restraining order. The contention of the appellees is that this restraining order was a preliminary injunction, and the order of the court passed after the hearing which was appointed was the dissolution of the injunction already granted. When the court passed the order setting a day for hearing, and meanwhile restraining the appellees till the hearing, it is very evident that the court was not acting finally on that application for preliminary injunction. The court wanted opportunity to consider whether a case was made for preliminary injunction, and therefore ordered a hearing on the application made by the bill. When that hearing was had, the preliminary injunction was refused, and the order refusing the same is the subject of the appeal. We think it does fall within the statute, and that appeal was properly prayed and granted. The motion to dismiss must be overruled.

Right to appeal.

For the purpose of deciding this case we must not consider the question whether the act of assembly, under which the appellee claims corporate powers, was constitutionally enacted. We may assume, without so deciding, that it was; for, conceding that it was lawfully passed, we are of opinion that the appellee never acquired lawful corporate existence under it. If it did not acquire corporate life under that act, the injunction should have gone. The statute appointed commissioners to take subscriptions for the stock of the road it authorized to be built, upon specified conditions, and within certain limitations as to time. Those commissioners were

Delay of commissioners in acting took away their powers.

not declared to be incorporated. They were the mere agents of the state to offer the charter to subscribers willing to accept it as offered. State *v.* Bull, 16 Conn. 179. Those who should become subscribers for stock of the corporation intended to be formed were, by the second section of the act, declared incorporated. The act went into effect on the day of its passage, and made a corporation possible; but the stock had to be taken as prescribed before there would be incorporators to accept the charter offered to them. Subscribers to the extent of $25,000, with $5 per share actually paid in, were necessary to justify an organization as a corporation. Before there could be an acceptance of the charter, and its conditions and limitations, subscribers to the extent mentioned were necessary. They were incorporated, and not the commissioners. The latter, being the state's agents to make the offer, could not accept it. They need not be stockholders, and might never be such; and until they should become subscribers for stock they could have no voice in the matter. Confessedly, no stock subscriptions were made until September, 1891, which was more than 19 years after the passage of the act tendering the charter upon the terms and limitations mentioned in it, and more than 9 years after the time limited for completing the road. Construing the act, as is our first duty, we think it intended to offer the corporate existence and corporate powers mentioned in the act to such stock subscribers as would accept the offer on the conditions annexed. The commissioners named were charged with a specific duty. They could do nothing which the act did not authorize them to do; they could offer nothing to subscribers but what was given them to do; and it was their duty to so discharge their functions that the conditions of the offer might, by possibility, be complied with. Certain limitations were imposed in the act. The road was to be commenced within three years, and was to be completed within ten years, from the passage of the act. The commissioners to take subscriptions must act, therefore, within such time that subscribers to the stock, who were to be the corporation, could accept the conditions annexed, and could make the effort, at least, to do what was authorized. When, therefore, the commissioners delayed action until the limitations imposed by the act had fully attached, and the time limited for beginning and finishing the road had long passed, it would seem to be clear that the powers of the state's agents were at an end, and their power must be enlarged by legislative action to justify their doing anything under the act. They had no right to offer to subscribers anything but the charter, with its conditions; and when the

conditions became impossible of compliance before the state's agents offered it to anybody, it is clear that they were *functi officio*, and the act itself was no longer operative. It perished under its own limitations, and required legislative action to again vitalize it. The legislature was influenced by what was supposed to be the public interest, no doubt, at the time when the act was passed. Such a mode of conveyance for passengers and freight was deemed necessary for the public good at that time, and authority was given to form a corporation to meet the existing exigency. As was said in the case of State *v.* Bull, 16 Conn. 179: "We cannot suppose it was creating a supernumerary charter, to be laid away among the state records to await convenience or necessity of future times." In the case of State *v.* Bull the charter was not forfeited. That was not a case of forfeiture. The corporation was declared never to have come into legal existence; that the commissioners, acting as state agents, had not acted within a reasonable time, and had surrendered their authority by their delay. They had once offered the charter for subscriptions of stock, and the requisite stock was not taken. Ten years afterwards, the commissioners again took subscriptions, and the amount of stock, which the law had required should be taken before organization, was taken, and the company proceeded to organize; but the court said the commissioners on the part of the state to take subscriptions had no longer any authority to act, and that the charter was therefore not accepted in time. It is true that this decision was made in a proceeding on the part of the state, but the grounds of the decision are such as show that like objections ought to be entertained at the suit of anybody injured by the doings of a corporation claiming existence through void proceedings. The acceptance must not only be within reasonable time, but it must be of that which is offered. 1 Mor. Priv. Corp. p. 22; State *v.* Bull, 16 Conn. 179; Hammond *v.* Strauss, 53 Md. 12. In the last-cited case this court said acceptance is essential to the existence of a corporation, and whether there was an acceptance was a question for a jury, under the direction of the court as to what will amount to an acceptance. The case in which this court said that was one at law, where the existence of the corporation was in issue. Here the case is in equity, and the whole matter is for the court. The legal existence of a corporation is always open for inquiry. Hammond *v.* Strauss, 53 Md. 12; Smith *v.* Silver Valley Min. Co., 64 Md. 85, 10 Am. & Eng. Corp. Cas. 1; Lyons *v.* Orange, etc., R. Co., 32 Md. 18; Agnew *v.* Bank of Gettysburgh, 2 Har. & G. (Md.) 493. Acceptance being essential,

Acceptance was condition precedent to corporate life.

it becomes a condition precedent to corporate life. Whether that has been done within a reasonable time is a question of law for the court on the facts before it, for decision by the court, when arising in equity, or for instruction to a jury when the facts are to be found by it. Loring *v.* Boston, 7 Metc. (Mass.) 409; Chicago *v.* Dane, 43 N. Y. 240; Mizell *v.* Bennett, 4 Jones, (N. Car.) 249; Hammond *v.* Strauss, 53 Md. 12.

The time for finishing the road, under the law, expired in 1882, and no effort to get subscribers appears to have been made up to that time; or, if there was such effort, nothing was accomplished until September, 1891, when subscriptions were made and organization was effected. This was nearly ten years after the expiration of the ten years limited for completing the road. Was this an acceptance of the charter, as offered? It is admitted that acceptance was necessary; but the appellee claims this was all the acceptance which was required. The terms of the offer could not then be accepted nor complied with. They were impossible. Being impossible of acceptance or of execution, counsel for the appellant most pertinently and forcibly suggests how such an acceptance differs from one made before any limitation had attached, and within undeniably reasonable time, but with the express rejection of the time limit. If that had been done with the Lyons & Orange Railroad Case, already cited, staring at them, it would not have been contended that it would have been a valid acceptance. If not, why should it be a valid one, when parties wait till it is unnecessary to make the exception in relation to the time limit, because that has, by the delay, been rendered an impossible condition? We can see no escape from the conclusion that there is no difference, and that counsel's question can only be so answered.

But the appellees' counsel contend that this objection cannot, and no objection to the valid existence of this corporation can, be made at this time, and in this way, and that it could only be made by the state, or *scire facias*, or by *quo warranto*. It is unquestionably the law that a forfeiture for non-user or misuser, or for non-compliance with any of the conditions of the charter, after the corporation has once been legally enacted and invested with franchises, can only be availed of and declared at the suit of the state. The Canal Case, 4 Gill & J. (Md.) 1, is undeniable authority for this statement of the law, and we do not question it; but we do not think that case applies, nor do any that have followed this ruling apply to the case we consider. This case is not one where for-

Not necessary that objection should come from state.

feiture is asked to be declared. It is a question of legal birth. If the corporation had been legally born, its life could only be forfeited, and its death declared, at the instance of the state; but whether it ever did have life, or, in other words, ever was born, seems to us, upon both reason and authority, open to inquiry and contest at the instance of any one suffering from its unauthorized acts. If within a reasonable time after the passage of the law—for example, if before the time limit had attached in either of its aspects—the commissioners had taken enough subscriptions to enable the company to organize, and it had organized in acceptance of the charter, and delays in the construction of the road had occurred, until it was impossible to comply with the requirements of the act respecting the completion of the road, then we do not think any one could complain but the state, for it could waive the conditions and limitations annexed to the charter. Had such a state of facts existed, the Chesapeake & O. Canal Case, 4 Gill & J. (Md.) 1, and Hodges' Case, 58 Md. 620, and the other cases of like character cited by appellee, would have applied, and this appellant could not be sustained in his application for injunction because of such failure, and for the reason that the corporation was duly and legally in existence before default made, and the state only could complain and ask a forfeiture. This was so in the Canal Case. It had been fully invested with franchises and made a corporation by the express language of the act of assembly. In that case, and the others relied on, there was no question of legal existence in the start. In Hammond *v.* Straus, 53 Md. 1, already cited, the corporators were named, and declared a corporation; but it was held to be a legitimate inquiry whether the corporation had accepted the terms of a certain charter, and that inquiry was made in a case where the state was no party to the proceeding. A corporation as plaintiff, asserting rights, must establish its corporate existence to maintain its suit. That is the first step, if its existence be denied and put in issue. If it has committed a wrong, and justifies because of corporate authority to do what is complained of, it must establish that authority. It will not do to say that because it claims to be a *de facto* corporation it must be assumed to be a legal corporation till the state claims it is not. The common right of mere protection in the enjoyment of the rights forbids such assumption. A corporation cannot gain rights to recognition as such simply by claiming to be such, and holding itself out as such. Boyce *v.* Trustees, etc.. of M. E. Church, 46 Md. 372, Agnew *v.* Bank of Gettysburg, 2 Har. & G. (Md.) 493. In the last-cited case Judge ARCHER said: "Upon

authority, it is clear that the plaintiff, to maintain his case, must show that by law he has been effectually created a corporation." Insurance Co. *v.* Hart, 31 Md. 59; Lyons *v.* Orange, etc., R. Co., 32 Md. 18; and the Silver Valley Case, 64 Md. 85, 10 Am. & Eng. Corp. Cas. 1,—establish the same rule, viz., that whenever any act is essentially necessary to be done before a corporation can be regarded as *in esse*, that must be established, or the corporation cannot be held to be a legal entity. Fire Department of N. Y. *v.* Kip, 10 Wend. (N. Y.) 266. The act of 1872, chap. 284, did not create a corporation *eo instante*. It names as corporators future subscribers. It does use the term "hereby created," but that means that, when there are subscribers such as the act calls for, they are hereby declared a corporation. It provided for the formation of a corporation; but before there could be one *in esse* they must be the requisite subscribers to the stock.

We have already said that such subscribers were not only necessary, but they must accept the charter as offered; that this became a condition precedent; that they must be legal subscribers, capable of accepting, and must accept within a reasonable time. We have seen that, according to our construction of the statute, the powers of the commissioners, the state's agents, expired when they could no longer offer the charter as framed by the legislature, and that their act in taking subscribers was void. If so, it follows that there were no legal subscribers. But if that were not so, these subscribers did not accept within a reasonable time. It is not necessary for us to establish and lay down what, in any given case, is reasonable time; but we may safely say that, when nothing is done toward an organization and acceptance by subscribers, such as there were, until the full lapse of time within which they were to complete the road contemplated by the legislature, such acceptance was not within reasonable time. The offer was not accepted, for it could not be performed. It was impossible to do the thing which was required. We cannot say a corporation has been brought into legal existance which does not get even apparent existence till the thing it was to do cannot be done; or that, if it was intended as an acceptance, it was within reasonable time, The offer as made was not accepted. If it accepted at all, it accepted without any limitation whatever as to time, as fully as if it had said, "We refuse that condition." To allow the commissioners the right to take subscriptions for stock, and then to recognize such subscribers as competent to organize after such a lapse of time, when

Acceptance was not within a reasonable time.

they could not execute the terms of the contract, would be violating the principles, spirit, and terms of the act of assembly. It would be allowing the commissioners to do what the legislature did not authorize them to do. It would be according to them the power to change the offer, which the legislature never designed. It would be allowing practically a fraud to be perpetrated on the state, the appellant, and all, *in consimili casu*, as this court said would be the case against the corporation under the circumstances alleged in the bill in the case of Campbell *v.* Poultney, 6 Gill & J. (Md.) 94, if permitted, and where the court said a bill for injunction on the behalf of a stockholder was a proper remedy.

Delay of commissioners amounted to non-acceptance.

It was certainly not the intention of the legislature to allow the commissioners appointed under this statute to perpetuate their existence indefinitely by filling vacancies from time to time, as mentioned in the act, so as to enable them at any distant period, after the lapse of time prescribed by the legislature for doing the work, to continue until such time as they or their successors thought advisable, and then to bring by their act a corporation into existence, at will, which act of theirs nobody could gainsay but the state. If the state did not intend by this act to give such wonderful powers, then the attempted exercise of such powers was without warrant of law, and accomplished nothing,—was void, and any one interested may contest it. If that organization under that act cannot be questioned in this way at the instance of this appellant, then if the taking of subscriptions and organization had been delayed an hundred years, and then that was done which has now been done, nobody, no matter how much injured by its doings, could complain and be heard in the courts; and if the state did not interfere, unexampled injury and loss may be wrought without redress. Although other agencies for meeting the public convenience might in the mean time have been devised, adopted and introduced, if the position of the appellee be sound, an hundred years hence it would be possible for the stock to be taken, the charter to be accepted, and the work might proceed to the infinite damage of people who had a right to rely on the acts of assembly as dead. We cannot give our assent to any proposition involving such consequences. Even in the space of 19 years great changes will occur in the proximity of a great city. People had a right to assume that this project was abandoned. They had a right to suppose the authority to build the road no longer existed, and to improve, build and act accordingly. They had a right to look only to the limita-

tions in the act of assembly. For illustration, suppose, after the lapse of 50 or 100 years, and the improvement of properties as suggested, commissioners have taken the subscriptions, and the subscribers claiming corporate powers had organized, and proceeded to exercise, the powers of eminent domain given them in the seventh section of the act, and to condemn the right of way through such improved property. Can it be possible that, under such state of facts, the owners would not be allowed on application for injunction to question the rightful existence of such corporation? The mind instinctively shrinks from giving a negative answer. If, under such state of facts, the existence of the corporation could be questioned, and the owners could get relief, as in our opinion there can be no doubt, it must be competent in this case, and any similar case, to inquire into the question whether a corporation has ever had legal existence. We have already cited numerous authorities in support of this view, showing, as we think, this is the clearly accepted law in this state, and, as we understand it, the law in other states also. After careful examination of the cases to which we have been cited, and many more, we have been able to find no case where the law is as in Maryland, which really sustains the position of the appellee. Especial reliance has been placed on the case of County of Macon *v.* Shores, 97 U. S. 272, and we have examined it with great care, and cannot see that it touches the question which is engaging us. That was a suit by a holder of certain county bonds against the county for overdue interest coupons. The county court of Macon county had, in pursuance of legislative authority, ordered the county's subscription to the Missouri & Mississippi Railroad, and the county had issued the bonds, and this was a suit by a *bona fide* holder of some of those bonds, for interest due. The county, in defense, did raise the question, among others, that the railroad, to which the subscription was made, had at the time of the subscription no corporate powers, not having been organized within one year, as required by law. The court only held that, the plaintiff being a *bona fide* holder of the bonds without actual notice of alleged invalidity, no question could be raised as to the regularity of issuing the bonds by the county, as it could not affect his rights, and that, the company being a *de facto* corporation when the subscription was made, it was not competent to question the regularity of its existence in that collateral way in a case where the question at issue in fact was whether the town of Macon was responsible to plaintiff for interest on bonds it had issued, although issued in aid of the railroad. But

the court went further, and said that advantage could only be taken of forfeiture by non-user or misuser by *quo warranto*, and that individuals could not avail themselves of it in collateral suits until it was judicially declared. Being a Missouri case, the court said that the decisions of that state on the subject were controlling, and cited Kayser *v.* Trustees of Bremen, 16 Mo. 88, and Smith *v.* County of Clark, 54 Mo. 58. To the statement of the law applicable to the case of County of Macon *v.* Shores, as laid down by the supreme court, we entirely agree. It is in entire harmony with the law, as we understand it to be in such case. The question, being collaterally raised, was not cognizable in a case where the gist of the writ was the liability of a county to a *bona fide* holder of bonds it had issued, although issued in aid of such railroad. Besides, the railroad company had been made a corporation by the act of assembly, and non-user or misuser in such case can only be availed of at the suit of the state. Resorting to the Missouri decisions which the supreme court refers to as controlling its decisions, we find they have no application to the case as we have it presented to us. In Kayser *v.* Trustees, 16 Mo. 88, it was an application for injunction to restrain the trustees of the town from collecting certain taxes. The court held that the county court of St. Louis county, under a state of facts which gave it jurisdiction, had incorporated the town, and that, therefore, being a corporation created by legal authority, proceedings had to be instituted by the state to avoid it for fraud or other justifiable reason, and that the corporate powers thus acquired could not be assailed by a private individual. We have already in this opinion asserted the same doctrine. The case of Smith *v.* County of Clark, 54 Mo. 58, presents substantially the same question as was presented in the Macon Case, 97 U. S., in precisely the same way. The question was as to the liability of Clark county on bonds issued by the county to the Alexandria & Bloomfield Railroad Company for subscriptions to its stock, to a *bona fide* holder. On a motion for a rehearing of that case, after decision, the new point was made that the charter of the railroad company had ceased before the company was organized. The court only said that the question could not be inquired into in a collateral proceeding; that the company did exist, as a matter of fact, in the exercise of all its chartered franchises when the subscription to the stock was made by the county authorities. The county had issued the bonds, and a *bona fide* holder owned them, and of course they could not be denied payment for the reason attempted to be set up. None of these cases apply, in our apprehension, to this

case. The attack here is directly made against the corporation itself, and that, too, against all which was not made one in the beginning, as in those cases was the case, but where only provision was made by which one could come into existence, and which, in our opinion, never did legally acquire life. The order refusing the injunction must be reversed and the cause must be remanded, that injunction may issue as prayed.

ROBINSON, BRYAN and FOWLER, J. J., dissent.

BRYAN, J., (*dissenting.*)—I maintain that the appellee is validly invested with corporate power, and I shall briefly state the reasons for my opinion. The statute of 1872, chap. 274, is entitled "An act to incorporate the Baltimore, Hampden & Lake Roland Railroad Company." In September, 1891, the first subscriptions to the stock of the corporation were made. It was then organized, and is now regularly conducting it business under its claim of chartered right. The question affecting its corporate existence arises under the eleventh section of the act of assembly, which is in these words: "And be it enacted that said company shall commence said railway within three years from the passage of this act, and complete the same in ten years." The appellant contends that, inasmuch as the railway was not commenced within three years, and not completed within ten, the act lost all its efficacy; that it was not competent for the subscribers to the stock to organize, and to exercise the franchises offered by the act, but that they were entirely lost by reason of the long delay in making use of them. We cannot correctly estimate the force of this objection without an accurate view of the rights conferred by the act of assembly, and the mutual relations of the state and the subscribers to the stock. The act of incorporation is an offer on the part of the state to give certain privileges to those persons named in the act as incorporators. When this offer is accepted, the grant of privileges from the state is complete, and full corporate power is conferred. All the authorities, without exception, consider the state and the incorporators as occupying the same position as private persons contracting, or proposing to contract, with each other. It is on this conceded principle that their respective rights and duties are ascertained and determined. Another important consequence also follows, and that is, that third persons are not interested in this contract, and are not authorized to interfere between the parties to it. Their relation has been likened to the case of landlord and tenant, where there is a clause of forfeiture for non-payment of rent. For however long a period the rent may be in arrear, no

one can take advantage of the clause of forfeiture but the landlord, and he only by entry for condition broken. No reference is now made to those cases in which, by the terms of the lease, the estate becomes *ipso facto* void when the rent is not paid by the appointed day. They are like the provisions in some acts of incorporation, which declare that on failure to do certain acts "the corporate existence and powers shall cease." In such cases it has been sometimes held that there is no cause of forfeiture to be enforced, and the franchises are lost without any act or proceeding on the part of the state, as in the analogous case of landlord and tenant the lease absolutely determines without entry.

In Chesapeake & O. Canal Co. *v.* Baltimore & O. R. Co., 4 Gill & J. (Md.) 124, the case before the court is compared to a grant of land. The court say: "And it is like the grant of an estate in land, defeasible on the non-performance of a condition subsequent, strictly speaking, as if an estate be granted expressly upon condition to be void, on the happening of a certain event. In such case it is perfectly clear that the estate is not defeated by the mere happening of the event, but that the law permits it to continue beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of condition by entry, etc., which cannot be done by a stranger. The proceeding by the government, the grantor, for the breach of a condition subsequent, contained in a charter of incorporation, is by *scire facias* or *quo warranto*, by an individual grantor (or his heirs) of land by entry." There can be no valid distinction between the different kinds of forfeitures which the state has power to enforce. It may enforce all or any, and it may waive all or any; and no private individual is authorized to interfere either with enforcement or waiver. No distinction has been suggested in any text-book, or in any decided case, between forfeitures of rights before the organization of a corporation and those which occur afterwards. Certainly, the power of the state is the same in each case, and the general principle must apply to each case that a right subject to forfeiture continues to exist until the forfeiture is enforced by the party who has a right to enforce it. In County of Macon *v.* Shores, 97 U. S. 272, one of the defenses to an action by a corporation was that it had no corporate power or existence, that it did not organize or accept the act of incorporation within one year, as required by law, and that it did not commence the transaction of business within the time prescribed by law for that purpose. The court said: "The objection that the corporation was not organized within the time limited by the charter is un-

availing. It is in effect a plea of *nul tiel* corporation. In Kayser *v.* Trustees of Bremen, 16 Mo. 88, the supreme court of the state said: 'It cannot be shown in defense to a suit of a corporation that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by a misuser or non-user. Advantage can only be taken of such forfeiture by process on behalf of the state, instituted directly against the corporation for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits until it be judicially declared.'" I quote this passage to show that the supreme court of the United States considered that there was no difference between a forfeiture committed before a corporation is organized and one which occurs afterwards. In State *v.* Bull, 16 Conn. 179, an information at the suit of the state, the franchises granted by an act of incorporation were declared to have been forfeited and lost by reason of unreasonable delay on the part of the corporators in accepting the charter. But it was not suggested in the argument or decision of the case that there was any difference between forfeiture of this kind and any other, so far as its effects were concerned, or the mode of proceeding to take advantage of it. It was not supposed that it was in the power of any one but the state to implead the corporators for such defaults. And as it has never been questioned that the state can at its own will and pleasure waive these forfeitures, it must follow that a private individual cannot enforce them, because if he could do so the state's sole and exclusive prerogative of waiver would be defeated. The proceeding on the part of the appellant would virtually annul the charter, and consequently the right of the state to continue it in force by waiver would be taken away.

I cannot see how the completion of the railway within ten years after the passage of the act of incorporation can be regarded as a condition precedent to the existence of the corporation, as one of those indispensable preliminaries which must be performed before the corporation can have an existence. It was impossible that the railway could be constructed before the corporation was organized. Its construction was the principal result to be accomplished by the corporation after it should be invested with its franchises. To be sure, as this corporation was organized after the expiration of the ten years, it had become an impossibility to complete the road within the prescribed time. But the state has as much right to waive a condition which it has become impossible to perform as one which, being possible, the corporation refuses or neglects to perform. In what respect is the state's power limited on this subject? By what

authority has the limitation ever been declared? On what principle of reason can a distinction be maintained between the power to waive the possible, and the power to waive the impossible? Finally, in what treatise or in what judicial decision has the distinction ever been intimated? In Hodges' Case, 58 Md. 603, it appeared that a railway company had been authorized by a city ordinance to lay railroad tracks in certain streets in Baltimore. The ordinance enacted that the work was to be commenced within six months from its approval, and to be completed within twelve, and that "otherwise the rights and privileges herein granted shall be null and void." It was attempted by private persons, on many grounds, to enjoin the railway company from laying its tracks, and, among others, for the reason that the work had not been commenced within the appointed time. This court did not trouble itself with any attenuated distinctions between conditions which had become impossible from lapse of time and other conditions, but decided that the condition was intended for the benefit of the city, and that the city might waive it at pleasure, and it denied the right of interference by third persons. I will quote a passage from the court's opinion: "This is a provision, however, intended for the benefit of the city, and one which its authorities may waive at pleasure. No principle is better settled than that a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally or in any other mode than by a direct proceeding for that purpose against the corporation." Now, on the mere point of waiver, it is impossible to draw a distinction between this case and the one at bar. If the corporation has forfeited its right to become incorporated, it must be that the state has the power to waive it, and it is a question exclusively between the state and the corporation. The appellant in this case has no more right to take advantage of it than the complainants possessed in Hodges' Case.

INDIAN RIVER STEAMBOAT CO.

v.

EAST COAST TRANSPORTATION CO.

(*Florida Supreme Court, Dec. 21, 1891.*)

Motion to Dissolve Injunction—Exceptions to Answer.—Pending a motion to dissolve an injunction on bill and answer, exceptions are filed to portions of the answer not in response to the bill. The filing of such exceptions is of itself no objection to the dissolution of the injunction, where

the portion of the answer not excepted to contains a sufficient denial of the equities of the bill.

Same—Equities of Bill.—A motion to dissolve an injunction on bill and answer involves the sufficiency of the equities of the bill to justify the writ in the first instance.

Injunction to Restrain Trespass—When Granted.—A court of chancery will not grant an injunction to restrain a trespass merely because it is a trespass; yet it will interfere by injunction where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where it is necessary to prevent a multiplicity of suits, and especially where the trespasser is alleged to be insolvent, and nothing can be realized on judgments that may be obtained against him at law. In such cases it will not do to simply allege that the complainant has no adequate remedy at law, and that his damages will be irreparable. The court will not act upon his opinion or his fears in such matters, but he must state facts in his bill to enable the court to determine whether or not his alleged injury will be irreparable.

Motion to Dissolve Injunction on Bill and Answer—New Matter in Avoidance.—On motion to dissolve an injunction on bill and answer, where sufficient equities are stated in the bill, the court will look to such facts of the answer only as are responsive to the bill; and a respondent will not be permitted to rely upon new matter in avoidance, in his answer, not in response to the allegations upon which the equities of the bill are founded.

Chancery Practice—Dissolution of Injunction on Conflicting Evidence—Discretion of Court.—Under the practice of the court of chancery, since the adoption of the act of the legislature (chap. 1098, Laws of Florida), where the answer denies all the circumstances, upon which the equities of the bill are founded. or where the bill and accompanying evidence are fully met by the answer and its accompanying evidence, the chancellor will ordinarily dissolve an injunction; but this is not an inflexible rule, and the granting or dissolving of injunctions is lodged in the sound discretion of the court, to be governed by the nature and circumstances of each case.

Docks and Wharves—Power of Railroad to Erect—Lease to Steamboat Company.—A railroad corporation, under the laws of Florida, has the right to erect and maintain docks, wharves and piers, as incident to its business, and to hold or dispose of them as may be deemed proper; but such corporation, engaged in the business of common carrier, has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steamboat companies.

Same—Right of Lessee to Enjoin Use of Dock by Other Companies—Terminal Facilities.—The Indian River Steamboat Company leased from the Jacksonville, Tampa & Key West Railway Company 390 feet of the east end of its dock on the Indian river, at Titusville, on which dock was located the railroad track and terminal facility of said railroad company; and said railroad company covenanted and agreed in said lease to maintain the railroad track on said dock and bulk-head, and the trestle supporting said track, and to furnish proper and adequate facilities for transfer of local freight to and from said bulk-head. *Held*, on this state of facts, the said steamboat company was not entitled to an injunction to restrain another steamboat company from landing at said railroad dock for the purpose of delivering and receiving freight to and from said railroad company.

Same—Same—Temporary Injunction—Dissolution—Relief Sought by Bill.—The bill asked for an injunction to restrain respondents from using the dock at Titusville, and the premises appurtenant thereto, as their headquarters and offices, and from using and occupying numerous other docks of complainant at other points on Indian river, and also that complainant be decreed the undisturbed possession of the same. A preliminary injunction was granted as to the dock at Titusville only. Respondents, upon the filing of the bill, answered, tendering an issue as to the docks other than at Titusville, and denied that they landed at the Titusville dock otherwise than for the purpose of delivering and receiving freight to and from said railroad company. *Held*, that, while the decree of the court dissolving the temporary injunction on bill and answer was proper, it was error to dismiss the bill, as it cannot be said that no other relief was sought, except to restrain respondents from landing their boats at the Titusville dock.

APPEAL from Brevard Circuit Court.

The Indian River Steamboat Company, appellant here, by attorneys, presented to the judge of the fifth judicial circuit, at chambers, on the 24th day of November, A. D. 1890, a bill for an injunction against R. P. Paddison, George M. Robbins, and Walter S. Graham, associated and doing business as the East Coast Transportation Company, at Titusville, Brevard county, Fla. The case made in this bill is this: That the Indian River Steamboat Company is a corporation organized under the laws of Florida, with its usual place of business at Titusville, Brevard county, Fla., and its business is, and has been since the 7th day of April, A. D. 1886, the transportation of freight, passengers, and mail matter upon Indian river; that in conducting said business it owns and uses seven steamboats, and during the winter season runs a daily line of steamers between Titusville and all points south and between Titusville and Melbourne on said river, and during the other portions of the year a daily line between Titusville and Melbourne, and a tri-weekly line between Titusville and all points south on said river; that the nature and extent of its business render the erection and maintenance of docks and piers at Titusville and elsewhere on said river necessary, and the right to do so is one of its charter privileges; that on the 9th day of February, A. D. 1889, it leased from the Jacksonville, Tampa & Key West Railway Company, so much of a certain dock and pier at Titusville as then and now lies on the easterly side of a line drawn 20 feet west of the most westerly building now and then constructed on said pier, to the easterly line of the bulkhead, with all the rights and privileges thereunto appertaining, the same being about 396 feet of the east end of the said dock, and that said dock and pier extend only to such depth of water in said river as affords a safe landing to such boats as said company possesses, and one suitable to its business,

and that said dock and pier do not interfere with the use or construction of other docks which are or may be constructed and maintained on adjacent property along the extensive water front at Titusville; that said leased dock and buildings thereon have been constantly occupied and used by said Indian River Steamboat Company for the purpose aforesaid, and for its offices, headquarters, and place of transacting most of its general business, since the 1st day of March, A. D. 1889, and that said company has agreed to pay an annual rental for said dock and pier of $500, payable quarterly, for the term of 3 years, and longer, unless a contrary agreement should be reached in the manner provided by the terms of said lease, and to keep said leased property in good repair, and perform certain other conditions enumerated therein, at great expense; that said rental has been paid, and all the other conditions fully performed, and said lease is in full force; that large and expensive additions have been made to said dock and pier by said Indian River Steamboat Company, at a cost of $3,000, and still said dock and pier, and the accommodations thereon, are inadequate fully to accommodate the increasing business of said company.

A copy of the lease, bearing date February 9, 1889, is attached to the bill as an exhibit.

It is further alleged in said bill that the sole object of said appellant company in entering into said lease was that it might control premises adequate to the transaction of its business, and since the 1st day of March, A. D. 1889, it has so occupied and controlled said leased property, and no other person or company has occupied the same, except by the consent of the said Indian River Steamboat Company, and that said company has never held itself out as a general wharfinger, or permitted the public use of said leased property.

Further, that during the summer or fall of 1890 said Paddison, Robbins, and Graham purchased or procured a steamboat, and are advertising to make regular trips upon said Indian river with one or more steamboats for the carriage of passengers and freight, and are seeking to make their headquarters and landing point at said leased dock or pier, and that they have been repeatedly informed by appellant company that said dock and pier were its private property, and that it could not and would not conduct the business of a wharfinger, or permit their boat to land thereat, but notwithstanding such notification they have persisted and still persist in landing, and do land, their said boat at said dock, through force of threats made by them that if they were deterred from landing, or hindered in any way in the trans-

action of their business at said dock, they would cause to be arrested the agents or employes of said steamboat company, and that for each package or shipment of freight or other matter refused to be received upon said dock they would sue said steamboat company for damages, and they threaten to continue daily to land at said dock, and use the same freely for all purposes connected with their business, without paying wharfage or other charges, and claim that said dock is public property, and they, in common with all other persons, are entitled to all the rights and privileges of said steamboat company in and about said leased property; that if the said Paddison, Robbins, and Graham are permitted to succeed in freely using and occupying said leased property the entire public will also insist on doing so, and said premises will become worthless as a franchise right and a place for transacting its said business.

It is further alleged that said steamboat company possesses the exclusive right to use and occupy said dock and pier for the purposes of its business, and that said respondents, Paddison, Robbins, and Graham, have no shadow of title or right to the use or occupation of said property, except through the courtesy of said steamboat company, and that this cannot be extended to them, because said dock and pier are inadequate to accommodate the business of said company, and that there is neither dock frontage or storage room sufficient to accommodate even the seven boats of said company, and one or more of them must needs be moved to permit the landing of respondents' boats.

It is further alleged that there is another dock at Titusville, not owned or possessed by said steamboat company, at which said respondents' boats can and frequently do land and transact business; that the winter business of said steamboat company is larger than its summer and fall business, and such winter business has begun and is rapidly increasing, and said company is soon to add other steamboats to its present service, and thus rendering imperative the use of all its dock room; that it is under contract to carry the United States mails upon said Indian River according to stated schedules and fixed time, and any violation thereof would subject said company to heavy penalties, and it is frequently necessary for said company to load and unload freight with the greatest dispatch, and to employ thereon a great number of men, in order to prevent delays in the carriage of perishable articles, and at the same time to comply with its said mail contract; that the use of said dock and pier by said respondents for any considerable time would cause inconvenience, delays, possible loss of connections, and prevent

said company from properly conducting its business, and would cause it irreparable damage; that said complainant company believes that said respondents cannot be deterred from using said dock and pier except by the daily use of superior force, and that if such force be used, or if packages of freight carried by or consigned to said respondents be refused to be allowed a landing on said dock, said steamboat company would be subjected to a multitude of vexatious suits; and that said company has no adequate remedy at law to prevent such immediate and irreparable injury.

It is further alleged in said bill that said steamboat company is the exclusive owner or lessee, and is in exclusive possession, of a large number of other docks, at various points on said Indian river, which were erected and are maintained at great expense by said company for its exclusive use and benefit; that these docks are not public, nor do they interfere with the free navigation of the river, and said company does not hold itself out as doing the business of wharfinger at any of them, as said respondents well know; that said docks differ from the docks and pier at Titusville in this: that they are smaller, and not well provided with storage room for the care and protection of freight, and are not intended to be used as the head-quarters or places for conducting the general business of said company, and do not afford facilities more than adequate to the needs of its business; that said respondents, without any right or title whatever, are making free use of such docks for all the purposes of their said business, and threaten to continue the same, against the protests and express orders of said complainant company, and that they threaten to use said docks daily, or as often as their business may require, by superior force, and to harass and annoy said company by a multitude of suits, should they in any manner be interfered with in the use of the same, or should wharfage be required of them.

It is further alleged that such interference with said docks, as above stated, would cause such litigation, expense, trouble, and delays as seriously to affect its business, prejudice its interests, and cause such irreparable damage that courts of law could not conpensate it for the same, and that said complainant company believes that said respondents are not pecuniarily responsible for any and all damages which said company may suffer by reason of their repeated and threatened interferences with said docks, and that a judgment that might be recovered at law would be uncollectible against said respondents, and that said steamboat company is under contract to transfer and deliver immediately large shipments of freight and materials which peculiarly tax all its

facilities to the utmost, and render any interference with them especially harmful, and its rights would be unduly prejudiced if an injunction be not issued immediately, and without notice to defendants.

The prayer of the bill is that said respondents, their officers and agents, be restrained by injunction from further using or occupying said dock and pier at Titusville, or the premises or appurtenances thereto belonging, for the purpose of transacting thereat their business, except such business as they in common with all other citizens may properly transact with said company upon its private property, and from making said dock and pier the usual place for landing their boat, and for receiving and discharging freight and passengers thereat, and that said steamboat company be decreed the undisturbed and undivided right of possession of said leased premises, and that said respondents, their officers and agents, be enjoined from further using said other docks as their place of landing boats, and from receiving and discharging freight and passengers thereat; and for such other or further relief as the nature of the case may require.

The president of the steamboat company makes oath that he is acquainted with the facts stated in the bill, and they are true, except those alleged on information and belief; and, as to those matters, he believes they are true.

On this bill the judge at chambers granted a temporary injunction as to the dock and pier at Titusville upon the filing of a bond, in the sum of $500, to be approved by the clerk of the circuit court of Brevard county. The bond was filed in the office of said clerk on the 25th day of November, A. D. 1890, and writ of injunction issued, restraining and enjoining said Paddison, Robbins, and Graham, associated as the East Coast Transportation Company, from further using or occupying said dock and pier at Titusville for the purpose of receiving and discharging freight and passengers, and from making the same their usual place for landing their boats for said purpose, until the further order of the court.

On the 26th day of November, A. D. 1890, the respondents filed in said clerk's office their answer to the bill, and also mailed to the counsel for said steamboat company a notice that application would be made to the judge of said circuit on the 2nd day of December, A. D. 1890, for a dissolution of said temporary injunction.

The material averments in the answer are as follows: That the East Coast Transportation Company was G. F. Paddison, George M. Robbins, and Walter S. Graham, and not R. P. Paddison, as stated in the bill, and, at the time of filing the answer, is a corporation existing under the laws of

Florida, articles of association having been duly filed with the clerk of the circuit court of Brevard county on November 22, 1890, and on same day forwarded to the secretary of state at Tallahassee, Fla.; but respondents waive any benefit or advantage of the failure to denominate them as a corporation in complainant's bill, and appear in their corporate capacity, as the East Coast Tranportation Company.

Respondents admit that the Indian River Steamboat Company is a corporation under the laws of Florida, and that it is engaged in the business and employs the steamboats on the Indian river as alleged in its bill, and that the nature of its business renders the erection of docks and piers at Titusville and elsewhere on said river desirable; but respondents do not know, and pray proof to, the extent of the charter rights of said steamboat company in the premises. Respondents admit the lease by the Jacksonville, Tampa & Key West Railway Company to said steamboat company, the use of the dock and payment of rent as alleged, but deny that said lease is now in full force and effect, or ever was valid or effectual in law.

Respondents admit that said steamboat company has made certain additions to the said wharf, on the south side, but does not know whether or not said company is fully accommodated thereby, and asks proof of said allegation.

Respondents deny that the sole object of said steamboat company in entering into said lease with the Jacksonville, Tampa & Key West Railway Company was to control premises adequate to the transaction of its business, but aver that its said object therein was also to control the terminal facilities of the said Jacksonville, Tampa & Key West Railway Company on the Indian river at Titusville, and thus to prevent the use of said railroad terminal facilities by any competing line of steamboats that might be put on said river, in order to preserve a monopoly of the transportation business of said river, and that said company has persistently denied the use of said railroad terminal facilities to respondents or to the general public since the lease aforesaid.

Respondents deny that said complainant corporation has never held itself out as a general wharfinger, or permitted the public the use of said leased property.

Respondents admit that they have purchased a steamboat and are advertising to make regular trips upon Indian river for the carriage of passengers and freight, but deny that they are seeking to make their head-quarters at the said dock, and say that they are landing at said dock for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa & Key West Railway Company, under

authority of a decree of the railroad commission of the state of Florida securing respondents in that right, a certified copy of which is attached to the answer.

Respondents admit that they were informed at one time by complainant corporation that it did not want to conduct the business of a wharfinger, but they aver that, after the said decree of the railroad commission, said corporation informed them that it would receive and receipt for all their freight at said dock on payment of a regular wharfage charge, and that respondents have continued to do business with said complainant corporation, as a general wharfinger, for the past three weeks, under said arrangement.

Respondents admit that they have intimated to the Jacksonville, Tampa & Key West Railway Company and its employes that if it violated the decree of the railroad commission by refusing to accord to respondents, at the end of its dock and railroad at Titusville, the same privileges and advantages as it accords to said steamboat company, notwithstanding its lease, that said neglect and refusal would be a violation of law, of which respondents would complain to the proper authorities of the state; but respondents have never threatened or otherwise intimidated the agents of said steamboat company, except they have threatened to complain of said railroad company if the use of its terminal was not accorded to them; and they do not care how the said railroad company and said steamboat company settle their differences in regard to the said dock, and have no concern except that said railroad company shall obey the said mandate of the railroad commission.

Respondents admit that they propose to land daily at said dock, or as often as it has business to transact there with the Jacksonville, Tampa & Key West Railway Company, and that said dock constitutes the charter terminal of said railroad company.

Respondents say they have paid wharfage to said steamboat company, under protest, for the use of said dock; but they only paid the same to prevent a breach of the peace, and until they could obtain relief from the courts from such illegal exactions.

Respondents admit that they claim that said dock is public property, and that the public is entitled to a free landing at it, without wharfage or other toll, because said wharf occupies and is a part of a public street of the town of Titusville, as will appear by the further allegations of the answer.

Respondents deny that said complainant corporation possesses the exclusive right to use and occupy said dock, or that respondents have no right to the use thereof, and they

deny that any of the said complainant's boats have ever been moved to allow the landing of their boat, or that there will be any occasion therefor in the future.

Respondents admit that there is another dock at Titusville at which their boat frequently lands to transact other than railroad business, but respondents say that the water is frequently too low to admit of their boat approaching said wharf, and there is always great danger in so doing, and said dock is totally inadequate to the needs of respondents' business.

Respondents admit that said complainant's present wharf privileges may be inadequate, as alleged, and they suggest that said complainant get quarters of its own, instead of appropriating a public street and a railroad terminal.

Respondents admit that they cannot be deterred from using said property except by the daily use of superior force, and that the use of such force, or the neglect by the railroad company to properly conduct respondents' business at said wharf, would subject said railroad company and said steamboat company to a multitude of vexatious suits.

Respondents deny that said complainant company is the exclusive owner or lessee of a large number of docks at various points on Indian River, or has not held itself out as a wharfinger at some of the docks it pretends to control, or that respondents have ever landed at any dock of which said company was entitled to the exclusive use.

Respondents say that the allegations of said bill as to wharf privileges, other than those at Titusville, are vague and uncertain, and they claim the same benefit in their answer as if they had demurred thereto for uncertainty.

Respondents further deny that they contemplate any such trespass upon said docks as the ordinary courts of law could not adequately compensate in damages for, or that they intend to trespass upon the rights, privileges or property, in any way whatever, of said company.

Respondents deny that they are not pecuniarily responsible for any and all damages they may occasion said complainant company unlawfully, and they say they do not believe that said complainant company is solvent.

Respondents deny that there was any occasion for the application to enjoin them without notice, as alleged in said bill.

Respondents, further answering, say that in July, 1890, they complained to the railroad commission of the state of Florida that the Jacksonville, Tampa & Key West Railway Company, a railroad corporation operating a railroad in the state of Florida, discriminated against respondents by

attempting to lease the exclusive use of its dock and river terminal to complainant company, by which said lease respondents, operating a competing line of steamboats had been discriminated against in the receipt and delivery of freight to said railway; that the said commission, by decision rendered on the 14th day of August, A. D. 1890, adjudged that the charter terminus of said railroad was the channel of Indian river, to which point said road had been constructed, and that the pier and dock at Titusville are a part and parcel of the main line of said railroad, and a necessary and indispensable facility which the law enjoins it to provide for the transportation of its business, and that said railroad company had attempted by said lease to the Indian River Steamboat Company to vest in it the exclusive use of said pier, and refused to grant the use of the same to the East Coast Transportation Company. Further it was considered and held by the said railroad commission that the said Jacksonville, Tampa & Key West Railway Company was guilty of a violation of § 4, chap. 3862, Laws Fla., and that said company do desist at once from such discrimination, and that it extend to the East Coast Transportation Company, the same uses, services, facilities and privileges at the end of said pier or wharf, in delivering and receiving freights from said company as are extended by it to the said Indian River Steamboat Company. A certified copy of said proceedings and decision of said railroad commission is attached to the answer.

Respondents further aver that no proceedings have been had to set aside the said decision and order of said commission, and it is operative as a law of the state, and gives respondents the right to land at said dock and wharf for the purpose of receiving and delivering freight to and from said railroad; that said decision cannot be attacked in a collateral way, nor will an injunction lie to restrain the execution of the mandate of said commission, but the same can only be set aside or restrained by a court in a direct proceeding against said commission, as prescribed by § 21, chap. 3862, Laws Fla.

Respondents allege the decision of said railroad commission as a complete bar to the relief prayed in complainant's bill, so far as it relates to the railroad wharf at Titusville, and they pray the same advantage thereof as if the same had been urged by way of plea to the bill of complaint.

Respondents further allege that the said lease by the Jacksonville, Tampa & Key West Railway Company to the said complainant company is not merely voidable, but the same is utterly void and worthless, upon its face, as repugnant to the common and statute laws of Florida, and a violation of

the charter duties of said railroad, in attempting to exclude the general public from the use of a portion of its road, which is a public highway of the state, and a further violation of law, in that it attempts to give to said complainant corporation the exclusive use of said railroad terminal, to the exclusion of all other competing lines of steamboats, including that of respondents.

Respondents further allege that the threats charged to have been made by respondents in said bill of complaint consisted solely in a notification sent by them to the president of said steamboat company that he should comply with the above decision of the railroad commission and the laws of the state of Florida, or stand a trial for their violation; that said president is the active and responsible manager of the said Jacksonville, Tampa & Key West Railway Company, and it was in this latter capacity that it became his duty to obey the orders of said commission, and for the omission to do which respondents threatened to prosecute.

Respondents further say that they have a legal right to land at said wharf to receive and deliver freight to and from said railroad company, and that any interference with said right by complainant company, either by wharf charge or other restrictions, is a trespass upon their right, and that said lease from said railroad company is void in so far as it conflicts with their right to use said wharf.

Further answering, and in reply to that portion of the bill alleging that respondents claim said dock and wharf to be public property, and the public are entitled to the free use of same, they say that said wharf occupies and is a part of a public street of the town of Titusville, called "Broad street;" that a map of the town site of Titusville was placed on record by the proprietors thereof on the 9th day of February, A. D. 1878, when said town site was a part of Volusia county, and that upon this map Broad street was shown as at present located, except that it was 106 feet instead of 100 feet wide; that a lot was purchased on the south side of said Broad street (by said map), and devoted to business purposes, and after that part of Volusia county, including Titusville, was joined to Brevard county, and in the year 1881, the original proprietors of said town site had a map of said town placed on record in Brevard county, showing the streets substantially as on the first map, certified copies of portions of said maps being attached to the answer of respondents.

Respondents further aver that, upon the faith of the dedication of the streets shown on said maps, lots were bought, money invested, and the town built up by the public, and that said dedication and use of Broad street vested the right

thereto in the community beyond the subsequent control of said original proprietors.

That the object in locating the town of Titusville upon the river was to enjoy its facilities as a highway, and, Broad street being one of the only two avenues leading to the river by which it could be reached from the interior of the town without going over private property, the right to pass over said street to the river was dedicated by said maps, and the terminus of said street at the river was used by the public in accordance with the dedication by the original proprietors from 1876 until its use was interrupted by said complainant in this suit.

Further, that in 1885 the Atlantic Coast, St. John's & Indian River Railway Company procured from Mrs. Titus, the original proprietor of the town site of Titusville, a deed to all of Broad street, notwithstanding said street had been dedicated to and accepted by the public in 1876, and that the lots fronting thereon had been nearly all disposed of by said original proprietor prior to her sale of said street; that no dedication of Broad street for general railway purposes was ever made, the only dedication of it being to the public to use as a street, as shown by said maps.

Respondents further allege that the Atlantic Coast, St. Johns & Indian River Railway Company commenced business in January, A. D. 1886, and soon thereafter leased its road to the Jacksonville, Tampa & Key West Railway Company, and that during the years 1886, 1887 and 1888 the use of Broad street, and the right to pass over the end of it to Indian river, was enjoyed equally by the railroad company and the public at large, although the street had been extended to the channel of the river by the railroad for the accommodation of its business, and the right of the public to a free landing at the end of said street, according to its original dedication, was not interrupted until the year 1889, when the said Jacksonville, Tampa & Key West Railway Company attempted to lease that part of the street where it had been extended to the channel of the river to the complainant, the said Indian River Steamboat Company.

Respondents also allege that no proceedings have ever been taken to condemn any portion of Broad street for railroad purposes, that the deed from Mrs. Titus to said railroad company in 1885 is void as far as it attempts to interrupt the easement of the public in said street; and that said railway company and its attempted leesee, the said complainant in this suit, are trespassers upon said street, which is public property, under the control of the town council of Titusville, and not in the Jacksonville, Tampa & Key West

Railway Company or in said complaint.

In conclusion, respondents pray the same advantage of their answer as if they had pleaded or demurred to the bill of complaint.

Affidavits of W. B. Watson and S. M. Lorimer were filed on behalf of complainant company before the judge, at chambers, on January 2, A. D. 1891. These affidavits will be referred to in disposing of the questions to which they relate in the discussion of the case.

On the 3d day of January, A. D. 1891, the said complainant company filed with the judge, at chambers, a motion to strike from the files the answer of respondents, because it purports to be the answer of a corporation, and is not under its corporate seal; that, if said answer be considered the answer of individual stockholders, it is improper, as, to some or all of them, it was filed without leave first obtained; and because the motion to dissolve is based upon the answer, and must fail if there is no proper answer. Subsequent to the filing of this motion to strike, and without any action being had thereon by the court, complainant filed with the judge, at chambers, certain exceptions to the answer of respondents, on the grounds of scandal and impertinence. The portions of the answer alleged to be scandalous and impertinent are pointed out. No disposition seems to have been made of the exceptions, but on the 7th of January, A. D. 1891, the judge made the following decision on the motion to dissolve the injunction, viz.: "This cause coming on to be further heard on motion to dissolve the injunction, after hearing counsel for both parties it is ordered, adjudged, and decreed that the temporary injunction heretofore granted herein be dissolved, and, further, that the bill be dismissed without prejudice."

The Indian River Steamboat Company, complainant below, appeals from the decree dissolving the injunction and dismissing the bill.

Hamlin & Stewart, for appellant.

Robbins & Graham, for appellees.

MABRY, J.—The question sought to be presented by the motion to strike the answer of respondents from the files does not properly arise. The bill was filed against R. P. Paddison, George M. Robbins and Walter S. Graham, doing business as the East Coast Transportation Company. The answer alleges that G. F. Paddison, George M. Robbins and Walter S. Graham composed the East Coast Transportation Company, and that R. P. Paddison was only an employe of said com-

Motion to strike answer from files.

pany. It is further stated in the answer that said company was then incorporated under the laws of Florida, but respondents waive the misnomer as to R. P. Paddison, and the failure to denominate them as a corporation in the bill. While they say they appear in their corporate capacity as the East Coast Transportation Company, in fact it is the answer of respondents individually, as they are sued.

Without a hearing on the motion to strike, complainant filed numerous exceptions to the answer, and said motion may be considered as abandoned.

The exceptions to the answer were filed after the motion to dissolve was made, and pending the consideration of said motion. It seems that an order *nisi* to dissolve an injunction, under the English chancery practice, obtained after exceptions to the answer have been filed, is irregular. Williams *v.* Davis, 1 Sim. & S. 262; Howes *v.* Howes, 1 Beav. 197. In Gibson *v.* Tilton, 1 Bland, Ch. (Md.), 352, it is said by the chancellor: "On the hearing of a motion to dissolve an injunction, objections of every kind to the answer may be made, and are then in order, because the motion itself, in its very nature, is founded upon the correctness and sufficiency of the answer in every particular. Hence the plaintiff may, on the very day of hearing the motion, file exceptions to the answer, and have them then heard and decided upon. The defendant can have no cause to complain of surprise, because, by his motion, he calls upon the plaintiff to show cause why, after having well and sufficiently answered the bill, the injunction should not be dissolved; and having thus planted himself upon the sufficiency of his answer at that time, and for that purpose, he stands pledged to sustain it in all respects, or he must fail in his motion." In Stilt *v.* Hilton, 31 N. J. Eq. 285, it was held that, where the answer sufficiently denied the grounds of equity upon which the injunction was granted, it will be dissolved, although exceptions to other parts of the answer have been filed. The court said: "The filing of exceptions to an answer is, of itself, no objection to the dissolution of an injunction. The court will consider the exceptions only for the purpose of ascertaining whether they relate to those parts of the bill on which the injunction was awarded." The exceptions to the answer in the case now under consideration are pointed specially at the portions setting up the decision of the railroad commission, and the location of the dock in question in a public street of the town of Titusville. The conclusion we have reached in reference to the effect of such portions of the answer on the issue before us, as will fully appear in a

Dissolution of injunction—chancery practice.

subsequent portion of this opinion, makes it unnecessary for us to consider the question of exceptions at all, as they relate to matters which have no bearing on questions settled here. We proceed to inquire then into the other matters presented for our consideration upon the appeal. In so far as correctness of granting or dissolving the injunction is involved, it is clear that we have to deal only with the matters presented by the record in relation to the Titusville dock, as no injunction was granted as to any other.

When injunction will lie to restrain trespass.

The appellees, in contending here for an affirmance of the decree of the lower court in dissolving the injunction, do not question, it seems, the sufficiency of the bill in point of equities to justify the issuance of the injunction on an *ex parte* showing. Upon information of the existence of the bill, and the issuance of the writ, they filed an answer, and upon that moved to dissolve. This they had a right to do, but their motion to dissolve involves the sufficient equities of the bill to justify the writ in the first instance. We will therefore inquire if the bill justified the issuance of the injunction. The last case decided by Chancellor KENT (Jerome *v.* Ross, 7 Johns. Ch. N. Y. 315,) has been recognized as occupying a foremost place on the subject of equitable jurisdiction in matters of trespass. In this case the remedy of injunction was invoked to restrain a defendant from digging and carrying away rock from plaintiff's premises, and was denied on appeal by the learned chancellor. Nothing special was alleged as to the value of the rock, or the uses to which it could be applied. The principle announced here is that an injunction will not lie to enjoin a mere trespass, where the injury is not irremediable and destructive of the estate, and when the ordinary legal remedy in a court of law will afford adequate satisfaction. In Shipley *v.* Ritter, 7 Md. 408, it is said that, although an injunction will not be granted to restrain a trespasser, merely because he is a trespasser, yet equity will interfere where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it had been held and enjoyed, or where it is necessary to prevent a multiplicity of suits. Here an injunction was decided to be proper to restrain the destruction of timber so situated with reference to a dwelling-house that it sheltered it from storms, and shaded it from the sun, and was ornamental to the grounds. A very clear view of the chancery court's powers in such cases is expressed in the case of Gause *v.* Perkins, 3 Jones, Eq. (N. Car.) 177. It is here said, much difficulty occurs in defining what injury is irreparable.

"The word means that which cannot be repaired, retrieved, put back again, atoned for." An example is given in this case of the destruction of the noble oaks in the state house grove. "But the meaning of the word 'irreparable,' pointed at by this example, is not that which has been adopted by the courts either in England or in this state. Grass that is cut down cannot be made to grow again, but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: The injury must be of a peculiar nature, so that compensation in money cannot atone for it. Where, from its nature, it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." There is nothing in the nature of a dock itself to make the landing of boats thereat a cause for equitable interposition. An injunction for this purpose was granted in the case of New York Printing and Dyeing Establishment *v.* Fitch, 1, Paige (N. Y.), 97. On appeal Chancellor WALWORTH dissolved it. He says, in dissolving this injunction, that "It is sufficient for the decision of the question immediately before the court that it does not appear that any serious damage or irreparable injury will take place if the defendants continue to run their boat and land their passengers, as they have heretofore done, until the complainant's rights are admitted by the answer or settled on the hearing. On the other hand, I can readily see that retaining the preliminary injunction may produce great injury to the defendants, and for which they would be entirely without remedy, if it should finally appear that they were only in the exercise of their legal rights." The view is expressed in this case that, while an injunction may issue to restrain a trespass, there must be something peculiar in the case to sustain the jurisdiction and bring it under the head of quieting possession, or to make a case of irreparable mischief, or the value of the inheritance must be put in jeopardy by a continuance of the trespass. It has been declared by our own court that "the object and purpose of an injunction is to preserve and keep things in the same state or condition, and to restrain an act which, if done, would be contrary to equity and good conscience; and it is the appropriate relief when the remedy at law is subsequent to the injury, and the effects cannot be adequately compensated." Pensacola & G. R. Co. *v.* Spratt, 12 Fla. 26. While it is said in this case that insolvency, alone, of the person against whom the injunction is asked, is not sufficient to give the court jurisdiction to grant the writ, yet this fact may be taken in connection with other equitable grounds to aid the jurisdiction. Young *v.* McCormick, 6

Fla. 368. In Burns *v.* Sanderson, 13 Fla. 381, it was held that averments in a bill that defendant had interfered and intermeddled with the real estate described in the bill, and continues to do so, and has and still continues to forbid the tenants and lessees to pay the rent to the plaintiff, and has forcibly entered one of the buildings on the premises, does not lay a foundation for an injunction. It is said: "The bill does not allege that irreparable damage or mischief will ensue, nor does it state the facts complained of, so that the court may form its own conclusion in reference thereto." For all the alleged trespasses and grievances in this case there was an adequate remedy at law, and nothing was alleged to show that irreparable injury would result, and the remedy at law is inadequate to fully compensate for it.

It is to be observed, in considering the sufficiency of a bill to justify an injunction in cases of trespass, it will not do to simply allege that complainant has no adequate remedy at law, and that his damage will be irreparable. The courts will not act upon complainant's opinion, or even his fears, in such matters; but he must state facts in his bill to enable the court to determine whether or not his alleged injury will be irreparable.

Tested by the rules applicable to such cases, we think the equities of the bill in the case before us, in reference to the Titusville Dock, are sufficient to justify the issuance, or proper application, of the writ of injunction. The bill alleges that the complainant company is engaged in operating boats on the Indian river, in the business of carrying freight and passengers, and is under a contract to carry the mails; that it has leased from the Jacksonville, Tampa & Key West Railway Company the portion of the dock and pier at Titusville particularly described in the bill, and has the exclusive right to use the same for the landing of its boats. Not only has it this right, but that it has been since March, A. D. 1889, in the exclusive use of said dock and pier, and its offices and headquarters are there; that said dock and pier are inadequate to accommodate fully complainant's business; and that it has never held itself out as a wharfinger. The bill also alleges that the character of its traffic business—carrying perishable products—and its mail contract require complainant to act with great promptness in making connections, and a failure to do so would subject it to forfeiture and heavy penalties; that its winter business is much heavier than in the summer, and that the winter business had set in, was rapidly increasing, and that all the room on said dock was imperatively demanded to enable com-

Equities of bill examined.

plainant to carry on its business, and meet its obligations under its mail contract; that the use of said dock by respondents for any considerable time would cause delays in loading and unloading, and possible loss of connections, and thereby cause irreparable damage; and further, that complainant was under contract to transfer and deliver immediately large shipments of freight and materials, which particularly tax all its facilities to the utmost, and that any interference with said dock would at the time be especially injurious. It is then alleged that respondents have procured one or more boats, propose, and are engaged in, carrying freight and passengers on said river, and that they persist in landing their steamboats at complainant's said dock through force and threats made by them that if they are deterred from landing, or hindered in any way in transacting their business at said dock, they would cause to be arrested the agents and employes of complainant, and that, for each package of freight or other matter refused to be received upon said dock, they would sue complainant for damages, and that respondents threaten to continue daily to land at said dock, and to use the same freely for all purposes connected with their business, without the payment of wharfage or other charges; that notwithstanding the lease of said dock to complainant, and its exclusive occupation of the same, of all which respondents have been fully informed, they claim that said dock is public property, and they have the right, in common with all persons, to all the rights and privileges of complainant in and about the same; and that if respondents are permitted to succeed in freely using and occupying said leased premises the entire public will also insist on doing so, and the same will become worthless as a franchise and place of business for complainant.

It is further alleged that complainant apprehends that respondents cannot be deterred from using said property except by the daily use of superior force, and that if such force be used, or packages of freight consigned to them be refused, complainant would be subjected to a multitude of vexatious suits, and the use of said dock by respondents would necessitate the removal of complainant's boats at times therefrom, and would prevent it from properly conducting its business, storing its freight, mooring its boats, and would thereby cause it irreparable injury. Not only would said interference with said dock by respondents cause litigation, expense, delays such as seriously to affect its business, prejudice its rights, and cause irreparable damage, but that respondents are believed to be insolvent, and the judgments that might be recovered against them would be

uncollectible. These averments are sufficient to justify the writ. See authorities above cited, and also Dudley *v.* Hurst, 67 Md. 44, 1 Am. St. Rep. 368, and note; Burnley *v.* Cook, 13 Tex. 586; Rogers Locomotive & Machine Works *v.* Erie R. Co., 20 N. J. Eq. 379.

Whether answer justified dissolution of injunction.

The motion to dissolve being based upon the answer of respondents, the justification of the decree of the court in dissolving the injunction must be found in the allegations of said answer, as respondents filed no additional evidence. In the beginning of an examination of the answer, we must keep in mind that, on motion to dissolve, respondents will not be permitted to rely upon new matter in avoidance, in their answer, not in response to the allegations upon which the equities of the bill are founded. It is stated in 2 High, Inj. (3d Ed.) § 1481, that "no principle of the law of injunction is better established than that where the equity of the bill is admitted by the answer, or is not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not equivalent to a denial of complainant's equities, and the injunction will not be dissolved, but will be continued until a hearing of the cause." The numerous authorities cited in the notes sustain this proposition. In Yonge *v.* McCormick, 6 Fla. 368, it was decided that the court, on motion to dissolve an injunction, will look into such facts of the answer, only, as are responsive to the bill, and, where a new equity is set up in the answer to avoid that disclosed in the bill, it will not be considered. *Vide*, also, McKinne *v.* Dickerson, 24 Fla. 366. In their answer, respondents admit that they have purchased a steamboat for the carriage of freight and passengers, and are landing the same at the said Titusville dock, and that they cannot be deterred from doing so except by the daily use of superior force. They say that they are landing at said dock for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa & Key West Railway Company, under authority of a decree of the railroad commission of the state of Florida, securing respondents in that right. Respondents then allege in their answer, that in July, 1890, they complained to the railroad commission of the state of Florida that the Jacksonville, Tampa & Key West Railway Company, a railroad corporation operating a railroad in Florida, discriminated against respondents by attempting to lease the exclusive use of said dock and pier at Titusville, which was the river terminal of said railroad company, and that upon their complaint, and after due hearing, said commissioners decided on the 14th

day of August, A. D. 1890, that the charter terminus of said railroad company was the channel of Indian river, to which point said road had been constructed, and that said dock and pier at Titusville are a part and parcel of the main line of said railroad, and a necessary and indispensable facility which the law enjoins it to provide for the transportation of its business; further that said railroad company, by said lease to said steamboat company, had attempted to vest in it an exclusive use of said dock; and it was thereupon adjudged that said railroad company was guilty of an unjust discrimination, under § 4, chap. 3862, Laws Fla., and that it at once desist, and extend to the East Coast Transportation Company the same uses, services, facilities, and privileges at the end of said dock as are extended to the complainant company. The decision of the railroad commission, a certified copy of which is filed as a part of the answer, is set up therein, as a complete bar to the relief prayed in the bill. This decision was based upon proceedings instituted by the East Coast Transportation Company against the Jacksonville, Tampa and Key West Railway Company, and the complainant steamboat company was not a party to it. While it is determined in said decision that during the years 1886, 1887, and 1888 the Jacksonville, Tampa and Key West Railway Company transacted all its business at the end of the said dock, and all its river freight was delivered at its freight-shed at the end of said dock, and that the said dock was a part and parcel of the main line of the railroad company, to which the Jacksonville, Tampa and Key West Railway Company succeeded by lease, and a necessary and indispensable facility for the transaction of its business, which the law enjoins it to provide, at the same time it was decided by the said commission that it had no jurisdiction of the Indian River Steamboat Company, and no order was made so far as this company was concerned.

It also appears by the said decision that the commission was proceeding under the last clause of § 4, chap. 3862, Laws Fla., which provides that no common carrier subject to the provisions of this act shall "make any unjust discrimination in the receiving of freight from, or in the delivery of freight to, any competing lines of steamboats in this state," and that they had not prescribed any rules and regulations defining or specifying what would be considered as acts of unjust discrimination under this clause, but deemed it advisable to let each case of alleged unjust discrimination rest upon its attending circumstances.

In the decision set up in the answer, the commission, on the complaint made, heard the facts, and decided against the Jack-

sonville, Tampa & Key West Railway Company as above stated. Appellees say that the decision has the force and effect of law, so far as their right to land at the said dock goes, and that the failure of the complainant company to allege and show this decision before the injunction was obtained was an imposition upon the court, and a just ground for dissolving the temporary injunction. On the other hand, the appellant company says that its lease was obtained from the said railroad company before the said decision was rendered, that it was not a party to the proceedings upon which said decision was based, and that the said railroad commission had no jurisdiction to adjudicate its rights in any manner whatever.

It will be observed that in this portion of the answer the decision of the commission is set up as a complete bar to the relief sought. The facts which the commission found and adjudicated to exist are not averred, but simply the decision of the commission is alleged as a sufficient defense to the equities of the bill. Under the rule above announced, we do not think the consideration of this portion of the answer comes properly before us. We are considering the correctness of the decision of the court in dissolving the temporary injunction, and the portion of the answer now under consideration is not in response to any allegation in the bill, and sets up new matter in defense of the case made in the bill. It is not such a negation of the equities of the bill as to be a responsive denial of the circumstances upon which they are based, and hence we are not called upon to pass upon this portion of the answer. Counsel for appellees do not contend that the portion of the answer alleging the dock to be a part of a public street, called "Broad Street," in the town of Titusville, is in response to the equities of the bill, and entitled to consideration on the motion to dissolve. In view of the conclusion which we have reached on the other allegations of the bill, it becomes unnecessary for us to consider this portion of the answer. What are the other allegations, then, of the answer, responsive to the equities of the bill? It is evident that complainant's equity for the injunction depends upon the validity of its title or right to the dock in question. Confining ourselves to the allegations in reference to the Titusville dock,—the one in question,—we see that the complainant company claims an exclusive right to use, occupy and land its boats at said dock. Its right to the exclusive use of this dock is derived, it is claimed, by lease from the Jacksonville, Tampa & Key West Railway Company. A copy of the lease is filed with the bill. The lease covers about 390 feet of the east end of the dock, and by the

terms of the lease the railway company "covenants and agrees to maintain the railroad track on said pier and bulkhead, and trestle supporting said track, and to furnish proper and adequate facilities for transfer of local freights to and from said bulkhead." It is further alleged that said leased dock and buildings thereon have been constantly occupied and used by the complainant company for its offices, headquarters, and place of transacting most of its general business, since the 1st day of March, A. D. 1889. Respondents deny that they are seeking to make their headquarters at said dock, but say they are landing there for the purpose of receiving and delivering freight to and from the Jacksonville, Tampa & Key West Railway Company. There is nothing in the affidavits to show that respondents are making any attempt to occupy any houses or to establish headquarters on said dock. It appears in one of the affidavits that at least two of the complainant company's boats were moved on one occasion to make room for respondents' boat to land at said dock. The landing at the dock by respondents' boat is admitted, but it is alleged to be for the purpose of receiving and delivering freight to and from the railroad company. Respondents admit the alleged lease from the Jacksonville, Tampa & Key West Railway Company, but they deny that said lease is now in full force and effect, or ever was valid or effectual in law. They aver that said dock, so leased, constitutes the charter terminal of said railroad company; and they deny that the sole object of said complainant company in entering into said lease with railroad company was to control premises adequate to the transaction of its business, but they aver that its object therein was also to control the said terminal facilities of the said railroad company on the Indian river at Titusville, and thus to prevent the use of said railroad terminal facilities by any competing line of steamboats that might be put on said river, in order to preserve a monopoly of the transportation business of said river, and that the use of said railroad terminal facilities has been denied to respondents and the public since said lease.

Respondents also allege that said lease by the Jacksonville, Tampa & Key West Railway Company to said complainant company is not merely voidable, but the same is utterly void and worthless, upon its face, as repugnant to the common and statute laws of Florida, and a violation of the charter duties of said railroad company, in attempting to exclude the general public from the use of a portion of its road, which is a public highway of the state, and a further violation of law, in that it attempts to give to said complainant company the exclusive use of said railroad terminal to the exclusion of all

other competing lines of steamboats, including that of respondents; and they deny the allegation that they are not pecuniarily responsible for any and all damages that they may occasion said complainant company.

The mere conclusions of law stated by respondents in their answer in reference to complainant's ownership or right to the said dock can have no weight in determining the questions before us. But independent of such statements, and of the allegations in reference to the railroad commission decision, and the location of the dock in the public street, the answer denies complainant's title or right to the exclusive use of the dock; and such denial is based upon the fact that said dock constitutes a portion of the track and the terminal facility of the Jacksonville, Tampa & Key West Railway Company, and the exercise of the right claimed by the complainant company would have the effect to exclude other competing lines of steamboats from landing at said railroad terminal facility. The bill discloses the fact that complainant's right to the dock was derived from the Jacksonville, Tampa & Key West Railway Company, which is a common carrier of freight and passengers, and the lease shows that said railroad company covenanted with the complainant company to keep the railroad track on said dock in repair, and to furnish adequate facilities for landing local freights from said dock. The answer, in effect, says that complainant has no right, notwithstanding its lease, to exclude other competing lines of steamboats from landing at said dock, because it is a part of a railroad track, and the terminal facility of a common carrier. William B. Watson, general superintendent of the complainant company, in his affidavit, states that he is personally familiar with the the objects that prompted the lease of said dock from the Jacksonville, Tampa & Key West Railway Company; that the main object is truthfully stated in the bill of complaint, and it was not the object of said steamboat company, in leasing said dock, to control the terminal facilities of said railroad company, or to prevent the use of said dock by any competing line that might be put on the river in order to preserve a monopoly; that at the time of said lease there was no opposition line upon said river, nor was there any rumor or prospect that any such competing line would exist; that said dock was not then adequate to the needs of said complainant company, and said railway company did not deem it a good investment for it to expend money in enlarging said dock, and keeping the same in good repair, for the revenue that could be derived from

Lease of dock by railroad—Exclusion of other companies.

it; that the terms of said lease were agreed upon between the railway company and complainant company as a fair and reasonable disposition of said property; and that the complainant company has expended more than $3,000 in adding to said dock since it went into possession of the same. It is also stated in the affidavit that all the dock room was needed for the complainant company in carrying on its business, and that it had never done a wharfinger business. The other portion of the affidavit has no reference to the lease. The other affidavit has no bearing on the subject of the lease.

Dissolution of injunction on denials in answer—Discretion of court.

The general rule on the subject of dissolutions of injunctions on bill and answer, prior to chapter 1098, Laws Fla., was that when the answer fully denied all the circumstances upon which the equity of the bill was based the injunction would be dissolved; but this was not an inflexible rule, and the granting and dissolving of injunctions was lodged in the sound discretion of the court, to be governed by the nature and circumstances of each case. Allen *v.* Hawley, 6 Fla. 143; Carter *v.* Bennett, *Id.* 214; Yonge *v.* McCormick, *Id.* 368; Hayden *v.* Thrasher, 20 Fla. 715. Under chapter 1098, Laws Fla., when "the defendant in his answer, shall have denied the statements of the bill or of the accompanying affidavit, either party thereto shall have the right to introduce evidence in support or denial of the bill and accompanying affidavit or answer before the injunction or other summary order shall be dissolved, and the chancellor shall dissolve or continue the order, or may require security, according to the weight of the evidence." The old rule is modified by this statute to the extent of allowing either party to introduce evidence in corroboration or denial of the bill or answer, and affidavits before the hearing on the motion to dissolve, and that the chancellor shall then determine the matter according to the weight of the evidence. Sullivan *v.* Moreno, 19 Fla. 200; Fuller *v.* Cason, 26 Fla. 476. While the chancellor will ordinarily dissolve an injunction upon an answer denying all the equities of the bill, or where the bill and accompanying evidence are fully met by the answer and its accompanying evidence, it does not follow, as a matter of course, to do so in all cases. Where fraud is charged an illustration is found in the case of Hayden *v.* Thrasher, *supra*, that mere denials of fraud or of fraudulent intent, without a full explanation of the facts charged in the bill, will not be sufficient to justify a dissolution of the injunction rightly granted in the first instance. And so, in case an injunction is granted to prevent irreparable

injury, the dissolution or continuance thereof rests in the sound discretion of the court, to be governed by the nature of the case. Fuller *v.* Cason, *supra.*

Are the averments of the answer given above, sufficient to constitute a responsive denial of the equities of the bill upon which rests complainant's right to relief? In the case of Sullivan *v.* Moreno, *supra*, the complainant alleged that he and his grantor had for more than thirty years owned and possessed certain described parcels of land lying on the Bay of Pensacola, and during all of said time had been in the quiet possession and enjoyment of all the rights of a riparian owner, until the defendant wrongfully entered into possession of certain portions of the front of said property out in the waters of said bay, and commenced the erection of certain docks, which, if permitted, would exclude plaintiff from his rights and do him irreparable injury. It is also averred that said docks will prevent navigation and perpetuate a nuisance. Defendant, in his answer, admitted that complainant had been in possession and claimed to own the land mentioned in the bill, in respect to which riparian rights were asserted; but he denied that said lots ever did extend to the ordinary high tide mark of Pensacola bay, and affirmed that said lots were always bounded on the part towards the bay by a public way, street or common, and exhibited a certified copy of a deed showing that the lots claimed by complainant were bounded by said public street, way or common. It was held that on this bill and answer in the absence of other evidence, no injunction should have been granted, as the equities of the bill were completely negatived by the answer. So it was said in the cases of Allen *v.* Hawley and Carter *v.* Bennett, *supra*, that a denial in the answer of the circumstances upon which the equities of the bill are founded will be sufficient, ordinarily, to dissolve the injunction. In this connection it may be proper to state that in the affidavits of the general superintendent and agent of the complainant company, interposed after the answer was filed, it is not denied that the said dock is a part of the track, and constitutes the terminal facility of the common carrier, the Jacksonville, Tampa & Key West Railway Company. It is true that one affidavit states that the motive in obtaining the lease was not to secure a monopoly, and exclude competing lines of steamboats from landing at the terminal facility of said railroad company; but the facts set up in the answer in reference to the character of the dock are not denied in the affidavit, and the failure to do so is a circumstance weighing against the complainant company on this point. If what respondents have averred in connection

with their denial of complainant's title or exclusive right to the dock be sufficient to destroy the equities of complainant's bill, we think it is so responsive as to be considered on the motion to dissolve.

Right of railroad to maintain docks—Regulation of its use.

The remaining question then is, has sufficient been shown to defeat complainant's equity to have the injunction continued? It is not to be denied that said railroad company, or said complainant steamboat company, has the right to erect and maintain docks, wharves and piers as incidental to their business, and hold them or dispose of them as deemed proper. The bill alleges and it is admitted that the complainant steamboat company is a corporation and that the nature and extent of its business render the erection and maintenance of docks and piers at Titusville and elsewhere on the Indian river, necessary, and the right to do so is one of its charter privileges, and under the laws of this state the Jacksonville, Tampa & Key West Railway Company is authorized to build and maintain docks and wharves as incidental to its business. If either company should erect a dock or wharf for its private use, we know of no law to prohibit it. At least, as the matter is now presented, without any allegation or proof that the exercise of such a right would transcend the powers of such corporations, or that it is the only facility of the kind in the particular place, we cannot hold that they have no such rights. Undoubtedly, if either company should erect a dock or wharf, and open it to the public for a general wharfage business, the public would have a right to use the same, under such reasonable regulations, and upon the payment of such charges as the owner might fix, or as might be regulated by law. Quachita & M. R. Packet Co. *v.* Aiken, 16 Fed. Rep. 890; Cannon *v.* New Orleans, 20 Wall. (U. S.) 577; Keokuk N. L. Packet Co. *v.* Keokuk, 95 U. S. 80; Parkersburg & O. R. Transportation Co. *v.* City of Parkersburg, 107 U. S. 691. But we are not dealing with the sole question of ownership or rights in reference to a dock or wharf. It is true that the bill characterizes the property in question as a dock or pier, and it appears that there are houses thereon, occupied by the complainant company as its offices and headquarters, and that said dock has been enlarged by said company, by expending over $3,000 on it since its said lease. No doubt there are portions of this said dock to which said company is entitled to the exclusive use. But it also appears that upon this dock is the track and terminus of a common carrier. The landing at said dock by respondent's boat for other purposes than delivering and receiving freight to and from said carrier is denied, and com-

plainant company, in the affidavits filed, do not deny that the railroad track and terminal facility of the Jacksonville, Tampa & Key West Railway Company are located on said dock. In fact, the contract of lease shows that said railroad company covenanted with the complainant company to keep in repair and maintain said track and afford facilities for delivering freight to the latter company. We do not overlook the fact that it is alleged in the bill that there is another dock at Titusville, not owned by complainant company, at which respondents can, and sometimes do, land their boat, and that said leased dock does not interfere with the use of said other dock, or those that may be constructed on the adjacent property along the extensive water front at Titusville. It is not alleged, nor is it contended here, that the other dock mentioned, or those that may be constructed along the water front, would offer respondents ingress and egress to the said railroad track and terminal facility. If it was designed by this allegation to show that respondents have another way of reaching said railroad on said dock for the purpose of delivering and receiving freight to and from said railroad it is too indefinite to accomplish this object. No such effect is claimed for it here.

The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian river by means of steamboats, rent from a railroad common carrier its docks on said river, on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of receiving and delivering freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this. In the case of New England Express Co. *v.* Maine Cent. R. Co., 57 Me. 188, the railroad company contracted with the Eastern Express Company to give them a certain specified space in the car attached to the passenger train, and to transport their agents and property on certain conditions, and agreeing specially that said railroad company would not grant or let any similar space in any car or cars attached to the passenger trains on its road to any other express company or persons during the continuance of said

Right of complainant to exclude other companies.

contract. This contract was declared to be void at common law, as being one obviously conferring a monopoly upon the express company. The chief justice, who delivered the opinion of the court, said: "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. All applying have an equal right to be transported, or have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry freight or passengers without just ground for refusal." In this case it was said, in effect, that the common carrier could not escape its common law liability, or avoid the performance of its duties to the public, by fencing off a part of a car for the Eastern Express Company. Quoting further the language of this opinion, it is said: "The very definition of a common carrier excludes the idea of the right to grant monopolies, or give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in order of their application. The corporations derive their chartered rights from the state. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select from those who may apply some whom they will, and reject others whom they can but will not, carry. They cannot rightfully confer a monopoly upon individuals or corporations." In this case the contract with the express company was entered into before a statute was passed in the state of Maine giving all expressmen reasonable and equal terms, facilities, and accommodations, and the use of depots, buildings, and grounds, for the transaction of their business upon railroads in the state; but the court held that the railroad company had no right, before the passage of the act, to make such a contract. A contract similar in its nature was held void in International Express Co. *v.* Grand Trunk Railway of Canada, 81 Me. 92, 37 Am. & Eng. R. Cas. 622. The same doctrine was announced in the case of Sandford *v.* Railroad Co., 24 Pa. St. 378. Judge LEWIS says in this case: "If it [the common carrier] possessed this power, it might build up one set of men, and destroy others; advance one kind of business, and break down another, and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The

rights of the people are not subject to any such corporate control. Like the customers of a grist-mill, they have a right to be served, all other things being equal, in the order of their application. A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law, and void." In Bennett *v.* Dutton, 10 N. H. 481, the facts were that the defendant was the proprietor of a stage-coach running daily between Amherst and Nashua, which connected at the latter place with another coach, running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst, and onward to Francistown. A third person ran a coach to and from Nashua to Lowell. The defendant agreed with the proprietor of the coach connecting with his line that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day that they applied for passage to places above Nashua. It was here held that defendant was bound to receive the plaintiff; there being sufficient room, and no evidence that he was an unfit person, or that he had any design to injure defendant. In Marriott *v.* Railway Co., 1 C. B. (N. S.) 499, it was held that an arrangement made by a railway company with the proprietor of an omnibus running between a station on its railroad and another point, to provide omnibus accommodations for all passengers by any trains on said road, by which the proprietor of said omnibus was allowed the exclusive privilege of driving his vehicle into the station yard of said railroad for the purpose of taking up and setting down passengers at the door of said railroad office, was a breach of the prohibition against granting unfair preferences. This decision was made under St. 17 & 18 Vict. prohibiting "undue and unreasonable" preference. Such a statute, however, has been regarded in America as declaratory of the common law, and the same result would be reached independent of the statute. Sandford *v.* Railroad Co., *supra*; 1 Wood, Ry. Law, p. 563, § 195. See, also, the following authorities bearing on this branch of the case: Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6; Rogers Locomotive & Machine Works *v.* Erie R. Co., 20 N. J. Eq. 379; Messenger *v.* Pennsylvania R. Co., 36 N. J. Law, 407; Messenger *v.* Pennsylvania R. Co., 37 N. J. Law, 531; McDuffee *v.* Portland & R. R. Co., 52 N. H. 430.

The respondents denied that they were insolvent, and there is nothing in the affidavits on this subject. In determining the propriety of dissolving or continuing an injunction, the chancellor may not only anticipate the character of the in-

jury that may result to the complainant in the event he should finally succeed, but he can also consider the extent and character of the damage which defendant may sustain by means of the injunction. New York Printing & Dyeing Establishment *v.* Fitch, *supra*. The proceedings here do not call for a cancellation of the lease from the railroad company to the complainant steamboat company, yet, from what has been said, it is evident that the latter company cannot avail itself of said lease to prevent the respondents from reaching the railroad track and terminal facility of the former company. State *v.* Hartford & N. H. R. Co., 29 Conn. 538. The temporary injunction was dissolved by the chancellor on bill, answer, and affidavits. His action should not be disturbed unless we can see that a sound discretion has been abused.

The chancellor not only dissolved the injunction, but dismissed the bill. In dismissing the bill, we think, there was error. The bill alleged that respondents were using and occupying said dock and pier at Titusville, and the premises and appurtenances thereto, and also using and occupying numerous other docks at other points on said river. The injunction prayed was to restrain respondents from such use of said docks, and from making them the usual place for landing their boat, and that complainant be decreed the undisturbed and undivided possession of said docks. No injunction was granted as to any of the docks except the one at Titusville, but respondents answered, tendering an issue upon the averments as to the other docks. They deny that they are making their headquarters on the Titusville dock, or using the same otherwise than as a landing at the railroad terminus for the purpose of receiving and delivering freight from and to the said railroad. It was proper, we think, to dissolve the injunction restraining respondents from landing their boat at the Titusville dock, under the circumstances. Still, the bill states a case which would, if proven, entitle the complainant to the relief asked upon the final hearing, and it was not proper to dismiss its bill without an opportunity to sustain it in the usual way of making proof in such cases. It cannot be said that no other relief was sought in the bill, except to restrain respondents from landing their boat at the Titusville dock. Under the allegations here, and the circumstances of this case, the bill should not have been dismissed. 2 High, Inj. § 1477; Gray *v.* Baldwin, 8 Blackf. (Ind.), 164.

Error of court in dismissing bill.

The decree of the chancellor, in so far as it dissolved the injunction, is affirmed, and, in so far as it dismissed the bill,

is reversed; the costs of the appeal to be divided between the parties.

Rights of Railroad Company in the Use of Its Wharves.—See New Orleans, M. & T. R. Co. *v.* Ellerman, (U. S.), 9 Am. & Eng. R. Cas. 144.

INTERSTATE COMMERCE COMMISSION

v.

BALTIMORE & OHIO R. CO.

(*United States Supreme Court, May 16, 1892.*)

Interstate Commerce Act—Legality of "Party Rate Tickets"—Discrimination.—It does not constitute an undue or unreasonable preference or advantage to a particular description of traffic, or an unjust discrimination against other persons traveling over the road, within the purview of the Interstate Commerce Act, for a railroad company to sell a single ticket, covering the transportation of ten or more persons from one place to another, at a discount of one-third from the regular passenger rate, where such reduction is not made by way of secret rebate or drawback, but is offered to the public generally. The Interstate Commerce Act was not intended to ignore the principle that one can sell at wholesale cheaper than at retail, and such tickets are within the commutation principle of allowing reduced rates in consideration of increased mileage.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

This proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates," whereby "parties of ten or more persons traveling together on one ticket will be transported over said lines of road between stations located thereon, at two cents per mile per capita, which is less than the rate for a single person; said rate for a single person being about three cents per mile."

There was another charge that the defendant was in the habit of selling excursion tickets without posting its rates

for the same in its offices; but this charge was subsequently abandoned.

The answer of the Baltimore & Ohio Railroad Company admitted that it had at one time in effect the so-called "party rates," but prior to the filing of the complaint had withdrawn said rates, not that it believed that they were illegal, but because it was claimed by other companies that said rates were put into effect in violation of an agreement between companies belonging to a certain association of which defendant was a member. It further averred that said rates were in no way a violation of the Act to Regulate Commerce, and were an accommodation to the public, necessary to the business of theatrical and other amusement companies, and that when the legality of such rates was properly raised for decision, it was prepared to defend the legality of the same. The answer further denied the right of the complainant to institute the proceeding, and prayed that the complaint might be dismissed.

The cause was heard before the commission, which found "that so-called party-rate tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets within the meaning of section 22 of the act to regulate commerce, and that when the rate at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore and Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party, which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the commission, on May 1, 1890, pursuant to section 16 of the Interstate Commerce Act, filed this bill in the Circuit Court of the United States for the Southern District of Ohio, for a writ of injunction to restrain the defendant from continuing in its violation of the order of the commission. The bill set up the proceedings which had theretofore been taken before the commission, and set forth as its gravamen that the defendant had wholly disregarded and set at naught the authority and order of the commission in that regard, and had willfully and knowingly disobeyed said order, and

had not ceased and desisted from allowing party-rates as it had been ordered to do; and had upon divers occasions since the service of said order charged rates for the transportation over its lines of a number of persons traveling together in one party, which were less for each person than rates contemporaneously charged under schedules lawfully in effect between the same points for the transportation of persons, citing a number of instances of such disobedience.

The answer admitted the proceedings set forth in the bill, but denied that it had been made to appear to the commission that defendant had violated the provisions of the Act to Regulate Commerce, or that the commission had duly and legally determined the matters and things in controversy and at issue between the parties; and averred that several of the conclusions of fact stated in the report of the commission were not true, or justified by the evidence produced at the hearing; and that the conclusions of law contained in the report, and the interpretation therein given to the act were not correct. It admitted that it had not wholly ceased charging rates for transportation over its lines for a number of passengers traveling together in one party upon one ticket, which are less for each person than rates contemporaneously charged by it for the transportation of single passengers between the same points, and admitted a violation of the order of the commission.

The seventh and eighth paragraphs of the answer are the material ones, and are here given in full:

"7. That for many years prior to the passage of the said 'Act to Regulate Commerce,' all the railroad carriers in the United States had habitually made a rate of charge for passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points, and such lower rates were universally made at the date of the passage of said act. To carry on this universal practice many forms of tickets were employed to enable different classes of passengers to enjoy these lower rates, and so stimulate travel. To meet the needs of the commercial traveler the thousand-mile ticket was used; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were used, *e. g.*, monthly or quarterly tickets, good for any number of trips within the specified time, and ten, twenty-five, or fifty-trip tickets, good for the specified number of trips by one person, or for one trip by the specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent

on a skeleton form furnished for the purpose; to accommodate excursionists traveling in numbers too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were issued also between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Long experience has proved the soundness of the principle. Under its application grew up the business of commercial travelers, the enormous suburban business, the constant travel between large cities, and the excursion business. Under its application has grown up also the business of traveling companies or parties, which has reached an aggregate of many hundreds of thousands of dollars, and which depends for its existence upon a continuance of the transportation rates under which it has grown up.

"8. That since the passage of the said 'Act to Regulate Commerce,' this respondent has continued as theretofore the practice above stated, of making a lower charge on passenger travel, in consideration of the amount and frequency of the travel, and with that purpose and to accommodate the various class of passengers, it has continued in use all the forms of ticket described in the next preceding section. That the charge fixed by it for the transportation of parties of ten or more, on a single ticket, has been two cents per mile per capita, which is the same rate charged on thousand-mile tickets, and is a higher rate than it charges on long-distance passenger travel, and excursion travel, and higher than its general rate for suburban travel on time or other suburban tickets. That the said charge for the transportation of parties on a single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carrier and of the public, because any higher rate would destroy the business. That the business reasons, circumstances and conditions which induced this respondent to make such lower charge for the transportation of parties as aforesaid, and that make it the interest of this respondent as a carrier to make such lower charge, are precisely the same reasons, circumstances, and conditions that induce it and make it its interest to fix a lower charge for the transportation of passengers buying mileage tickets, time or trip tickets, and excursionists. That while so-called party-rate tickets are used principally by traveling amusement companies, because no other form of ticket meets the requirement

of such companies, yet this respondent has avoided confining such tickets to any class of business, by offering them on the same terms to the public at large. That this respondent has obviated the danger that such lower charge for parties might be taken advantage of by speculators or ticket brokers, by issuing only one ticket for the whole party. And respondent avers that, as such tickets are now issued by it they are not and cannot be used for speculative purposes, and afford no opportunity for evading the law in the hands of ticket brokers. This respondent further avers that it may rightly and legally make a charge per capita for persons traveling on said party-rate tickets, lower than its charge for a single passenger making one trip between the same points, the character, circumstances and conditions of the service being substantially different, and that the making of such lower charge per capita to the member of the party makes or gives no undue or unreasonable preference or advantage to him, and subjects no person, company, firm, corporation, or locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The answer further averred the illegality of the order of the Commission, and averred "that by the true construction of the Act the second section thereof requires the same charge for transportation service only in cases where the commercial circumstances and conditions are substantially similar, and the third section requires the same charge to be made only when a difference in charge would work a prejudice or disadvantage to some one without reason therefor. That the twenty-second section, so far from making exceptions to an otherwise absolute rule, was inserted merely as additional precaution to insure the giving to the second and third sections of the Act the construction which Congress intended. That the twenty-second section is a legislative declaration; that under the provisions of the second section of the Act, circumstances and conditions of a commercial nature are to be considered, and among such circumstances and conditions, in the case of passenger traffic, the amount of service purchased or contracted for, and the interest of the carrier in stimulating travel are to be considered."

Upon the hearing before the circuit court upon pleadings and proofs the bill was dismissed, separate opinions being delivered by Judges JACKSON and SAGE (43 Fed. Rep. 37, abstracted, 45 Am. & Eng. R. Cas. 246). From this decree the Interstate Commerce Commission appealed to this court. The provisions of the Interstate Commerce Act, so far as

the same are material to this case, are set forth in the margin.*

A. G. Safford and *John W. Herron*, for complainant.
John K. Cowen, Harmon Colston, Goldsmith & Hoadley, and *Hugh L. Bond, Jr.*, for respondent.

BROWN, J.—Prior to the enactment of the Act of February 4, 1887 (24 Stat. 379), to Regulate Commerce, commonly

*AN ACT TO REGULATE COMMERCE.

"SEC. 1. That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage of shipment. * * *

"All charges made for any service rendered, or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimation, which is hereby prohibited and declared to be unlawful.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"SEC. 22 As amended by § 9 of Act of March 2, 1889, chap. 282, 25 Stat 855, 862). That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this act."

known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service. Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.), 393; Baxendale *v.* Eastern Counties R. Co., 4 C. B. (N. S.) 63; Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 237; *Ex parte* Benson, 18 S. Car. 365; Johnson *v.* Pensacola R. Co., 16 Fla. 623; though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the states Acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the state, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several states, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the several states. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The design of the Interstate Commerce Act.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail.

It is not all discriminations or preferences that fall within the inhibition of the statute: only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburg; but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice BLACKBURN in Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

What discriminations are forbidden.

The question involved in this case is, whether the principle above stated as applicable to two individuals applies to the purchase of a single ticket covering the transportation of ten or more persons from one place to another. These are technically known as party-rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party-rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns, or cities and suburban towns. The party-rate ticket upon the defendant's road is a single ticket

Party-rate tickets as commutation tickets.

issued to a party of ten or more, at a fixed rate of two cents per mile, or a discount of one-third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But assuming the weight of evidence in this case to be that the party-rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State or municipal government; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibitions of sections 2 and 3. In other words, whether the allowance of a reduced rate to persons agreeing to travel one thousand miles, or to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single-trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such tickets issued between points within the same state must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally aquiesced in by the public, it

When allowance of reduced rates is not a discrimination.

would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons travelling upon them.

But whether these party-rate tickets are commutation tickets proper, as known to railway officials or not, they are obviously within the commuting principle. As stated in the opinion of Judge SAGE in the court below: "The difference between commutation and party-rate tickets is, that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

Party-rate tickets are within commutation principle.

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveler the thousand-mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and ten, twenty-five or fifty-trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business, that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets, would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have those practices in view, and not to

have designed to interfere with them, except so far as they were unreasonable in themselves or unjust to others.

These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as a undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the small dealers engaged in the same business, and enable the larger ones to drive them out of the market.

No unreasonable preference or advantage shown.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago and St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party-rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing. If a case was presented where a railroad refused an application for a

party-rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and condition." To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge JACKSON in the court below: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

English traffic act and decisions.

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In Hozier *v.* Caledonian R. Co., 17 Sess. Ca. 302; S. C., 1 N. & M. Railway Cases, 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were

charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties traveling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So, in Jones *v.* Eastern Counties R. Co., 3 C. B. (N. S.) 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in Ransome *v.* Eastern Counties R. Co., 1 C. B. (N. S.) 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than they charged Peterboro merchants, who made arrangements with them to carry large quantities over their lines, and that the sums charged the Peterboro merchants were fixed so as to enable them to compete with the Ipswich merchants, the court granted an injunction, upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In Oxlade *v.* Northeastern R. Co., 1 C. B. (N. S.) 454, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway

companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald *v.* Hovey, 110 U. S. 619.

Facilities for ticket speculation.

There is nothing in the objection that party-rate tickets afford facilities for speculation and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party-rate ticket, as it appears in this case, is a single ticket covering the transportation of ten or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two-thirds of the regular fare for that number of people.

Pretext for evading law.

It is possible to conceive that party-rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates, but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party-rate tickets, as used by the defendant, are not open to the objections found by the interstate commerce commission, and are not in violation of the Act to regulate commerce, and the decree of the court below is, therefore, affirmed.

JERSEY CITY, NEWARK & WESTERN R. CO.

v.

CENTRAL R. CO. OF NEW JERSEY.

(*New Jersey Court of Chancery, Sept. 8, 1891.*)

Railroads Crossing at Grade—Manner in which Crossing May be Made.—Where a railroad corporation, formed under the general railroad law, locates its route so that its line crosses the route in another railroad, the law gives it the right to decide for itself whether it will cross such other

road at grade or otherwise. Its right to cross at grade is subject to but two limitations: *First*. It shall not cross at a less angle than twenty degrees; and, *second*, it shall not cross in such manner as will destroy the reasonably fair enjoyment of the franchises of the road whose route is crossed.

Eminent Domain—Finality of Verdict of Jury Fixing Compensation.—The verdict of the jury that tries an appeal from the award of commissioners fixes finally and conclusively the sum which, in that particular case, must be regarded as just compensation, so far as may be necessary to confer upon the condemning company the right, on the payment of the money, to appropriate the property condemned.

An Appeal by a Land-Owner from the Award of Commissioners Operates as a Supersedeas, and deprives the condemning company of the right to appropriate the land until the appeal has been determined, and the sum awarded by the jury is either paid or tendered.

BILL for an injunction by the Jersey City, Newark & Western Railway Company against the Central Railroad Company of New Jersey. Refused on certain conditions to be performed by defendants within a specified time.

Robert H. McCarter and *Thomas N. McCarter*, for complainants.

Robert W. De Forest and *Benjamin Williamson*, for defendants.

VAN FLEET, V. C.—This is a contest between two railroad corporations. The complainants were organized under the general railroad law. They have condemned a right to cross the defendants' road generally. The commissioners appointed to appraise value and assess damages awarded for such right, together with two small parcels of land, lying on each side of the defendants' route, $12,950. Both parties appealed from the award of the commissioners, and on the trial of the appeals before the Essex circuit court, by jury, the award was increased to $35,473.33. The verdict, it is admitted, was made up as follows: For land, $250; for putting in frogs, $2,700; for construction of signal station, $3,000; for one-half of the cost of maintaining frogs in perpetuity, $6,000; for one-half of the cost of maintaining and operating signal station in perpetuity, $23,523.33. The verdict, it will be observed, embraces not only compensation for the land taken, but also for duties to be performed perpetually by the defendants for the complainants. Within a few days after the rendition of the verdict the complainants made a tender of $2,950—the amount awarded for the land and the insertion of the frogs, which the defendants refused to accept, and the complainants then obtained an order authorizing them to pay the whole sum of $35,473.33 into this court under the statute of 1877. The money was paid into court under this order, and notice given to the defendants

Case stated.

that it had been so paid. The defendants' railroad, franchises and rolling stock were, when the condemnation proceedings were commenced, and also when the money was paid into court, subject to a mortgage for $50,000,000. The statute of 1877 authorizes the chancellor, whenever it is made to appear that lands taken by the exercise of the right of eminent domain are incumbered by a mortgage or other lien to order the money paid into the court of chancery, to the end that it may be distributed according to law; and the statute declares that such payment shall have the same effect as if the money had been actually tendered to the land-owner. Revision, p. 1278, § 2. After paying the money into the court, the complainants gave the defendants notice that their road was completed up to the west line of the defendants' road, and that they could not extend their road further east until the obstructions were removed, which the defendants had placed at the point of crossing, and frogs inserted there in the defendants' road. By the same notice the complainants also notified the defendants that, unless they inserted the frogs on or before a date named, the complainants would themselves proceed to insert them. The defendants thereupon gave the complainants notice that they would deem any attempt by the complainants to enter upon their property, or to interfere with their railroad, as a trespass, and resist it accordingly. On the date designated by the complainants as the time when they would themselves proceed to put in the frogs if they had not been put in before, the defendants collected a large number of men at the crossing for the purpose of resisting by force any attempt which the complainants might make to insert the frogs. At this point in the struggle the complainants filed the bill in this case. They ask that the defendants may be restrained from preventing them from entering upon the defendants' road at the point where their route crosses that of the defendants, and also from molesting or interfering with them while they are engaged in inserting in the defendants' road, at that point, suitable and proper crossing frogs for two tracks.

The defendants oppose the granting of an injunction on two grounds: *First*, they say that the complainants, by condemning a right to cross their road generally, have not acquired a right to cross at grade, but that a condemnation in this form simply gives a right to cross, leaving undetermined the way in which such right shall be exercised, and that the question as to the method of crossing—whether it shall be above, below, or at grade—is the proper subject of equity cognizance, to be decided, to a large extent, by public considerations, and in such manner as shall best promote pub-

lic safety and convenience; and, *second*, they say that, as the sum awarded to them by the jury was, with the exception of $250, intended as compensation for materials and work to be furnished and done by them for the complainants, the money does not represent property incumbered by the mortgage for $50,000,000, and therefore its payment into court was not a payment or tender to them, within either the words or spirit of the statute of 1877, and gave the complainants no right to enter upon their route. They also say that, inasmuch as the money was awarded as compensation for duties to be performed by them in the future, they cannot, in justice, be required to perform any of such duties until they have consented to receive the money, and it has actually been paid to them. They insist that, while it may be within the power of the complainants to take their property by the exercise of the right of eminent domain, still that they cannot, by any exercise of such right now authorized by law, be compelled against their will, to perform duties, for all time to come, for the benefit of the complainants.

Two propositions of law and one of fact, bearing directly on the main question in dispute, are, in my judgment, so well settled and obvious as to be beyond question. They are:

First. The complainants, by condemning a right to cross the defendants' road generally, have acquired a right to cross at grade. The law on this subject is settled. The established doctrine is this: That where a railroad corporation, formed under the general railroad law, locates its route so that its line crosses the route of another railroad, the law gives it the right to decide for itself whether it will cross such other road above or beneath its track or at grade, and that its right to cross at grade is subject to but two limitations, namely, (1) it shall not cross at a less angle than 20 degrees; and (2) it shall not cross in such manner as will destroy the reasonably fair enjoyment of the franchises of the road whose route is crossed. It has a right to cross in such manner as will result in inconvenience and damage to the road whose route is crossed, but not in such manner as will destroy the reasonably fair enjoyment and exercise of its franchises. The most recent authoritative statement of the law on this subject is found in the chancellor's opinion in National Docks & N. J. J. C. R. Co. *v.* State, 53 N. J. Law, 217, 47 Am. & Eng. R. Cas. 87, where, in pronouncing the unanimous judgment of the court of errors and appeals on this point, he said: "The right of one railroad to cross another, which is intersected by its route, is so plainly essential to its construction for any

Rights of Railroads crossing at grade.

considerable distance that it has become indisputably established, by implication, from mere authority to build a railroad between given points. * * * It is within the power of one railroad to determine by the location of its route where it will cross another; and it is impossible to perceive a sufficient reason why it may not also determine, within lawful bounds, how it shall cross the other. * * * In the acquisition of a right to cross, the ability of the existing company to fully, fairly, and freely exercise its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of creating another. The purpose is to preserve, multiply, and maintain highways for the development of the country and the general public benefit; and this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of lands used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such use should not yield, if the proposed interference with it is necessary, and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose road is crossed. Ability to enjoy all its privileges and to perform all its duties in a proper and reasonable manner being secured to the latter company, it must, upon being duly compensated, submit to the necessary inconvenience and damage which the crossing may occasion." It is thus seen that the law respecting the right of one railroad to cross the route of another at grade, in any case where such use of the route of the latter will not result in the destruction of the reasonably fair enjoyment of its franchises, is settled in such manner as to be no longer open to debate in this court.

Second. With a signal station, skillfully operated, at the point of crossing, there can be no doubt, as a matter of fact, that the complainants' road may cross that of the defendants at grade without preventing the defendants from having the reasonably fair enjoyment of their franchises. The crossing is on the meadows lying east of Newark. The objections to a crossing at such a point are obviously much less weighty and serious than those which exist against the crossing at Elizabethport, which the defendants have for many years used for their Newark branch over their main line, or which exist against the crossing at Elizabeth, jointly used by the defendants and the Pennsylvania Railroad Company. If the use of the two crossings just mentioned does not deprive the defendants of the ability to enjoy all their privileges and to

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Just compensation—Effect of verdict of jury.

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Sufficiency of complainants' payment or tender.

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Defendant not prevented from enjoying its franchise.

perform all their duties in a fair and reasonable manner, it is perfectly certain that the use of the crossing which the complainants have acquired cannot for many years to come, produce such a result.

Third. What is just compensation for the property taken and for the damages sustained by such taking, has been ascertained in this case in such manner as to give the complainants the right to appropriate the property condemned to their use, on making payment of the condemnation money, either actually or constructively. As I understand the general railroad law and the adjudications respecting its construction, the verdict of the jury that tries an appeal from the award of commissioners fixes finally and conclusively the sum which, in that particular case, must be regarded as just compensation, so far as may be necessary, to confer upon the condemning company the right, on the payment of the money, to appropriate the property condemned. The award of the commissioners is the first step in ascertaining what is just compensation to the land owner, and the verdict of the jury that tries the appeal from such award is the last and final step. "When," in the language of the chancellor in Waite *v.* Port Reading R. Co., (N. J. Ch.), 47 Am. & Eng. R. Cas. 263, "an appeal shall have been taken, the award of the commissioners ceases to be the just compensation [guaranteed by the constitution]. It is then no longer the proper sum to tender, and its payment into court will be without legal significance. The result of the appeal determines how much the just compensation is, and the sum to be tendered and paid. For this reason there must be delay in taking possession until the appeal shall be determined. Through the necessity for delay, thus made apparent, the appeal operates as a *supersedeas* upon the previous proceedings." And the statute declares that, when what is just compensation has been finally fixed by the verdict of a jury, on the payment of that sum, or, in case the money is tendered and payment refused, then on paying the money into court, the condemning company "shall be empowered to enter upon and take possession of the said land, and proceed with the work of constructing its road." Revision, p. 929, § 101.

Just compensation—Effect of verdict of jury.

The statement of these three propositions leaves but a single question to be decided, and that is, have the complainants made a payment or tender of the sum which has been finally determined as just compensation, in such manner as gives them a right to take possession of the property condemned, and proceed with the work of constructing their road? I

Sufficiency of complainants' payment or tender.

think they have, but it is not necessary to decide the case on that ground. The sum of money which constitutes what is just compensation to the defendants in the judgment of the law is in court subject to its control. One of the reasons why it was paid into court was because the defendants' railroad and franchises were incumbered by a large mortgage. Since the argument the mortgagee has filed a disclaimer, disclaiming all right, title, and interest in and to the subject-matter of this suit, and praying that the complainants' bill, as to it, may be dismissed. This disclaimer is, in its legal effect, a release, so that there is now no reason why the money may not at once be paid to the defendants. They are now entitled to it, and it should be paid to them, if they are willing to take it. They cannot, however, take it without thereby becoming subject to all the obligations and duties which the jury, by their verdict, meant to impose upon them. The defendants should, I think, be afforded an opportunity to take the money and to perform the duties which its reception will impose. An order will be made giving the defendants five days after service of a copy of it within which to decide whether or not they will accept the money. A written acceptance must be filed with the clerk. On an acceptance being filed, an order will at once be made directing the clerk to pay the money to the defendants. After receiving the money, the defendants will be required to proceed with reasonable speed in performing the duties which its reception will impose. If they refuse to receive the money, or fail to file an acceptance within the time limited, an injunction will be granted, authorizing the complainants to take such possession of the defendants' road at the point where complainants' route crosses that of the defendants as shall be necessary to enable the complainants to construct and insert in the defendants' road at that point suitable and proper crossing frogs for two tracks, and also restraining the defendants from interfering with or obstructing the complainants in any way while constructing and inserting such frogs. The injunction must, however, provide that all work which it shall be necessary to do at the point in question, whether it is done in removing obstructions or in preparing the defendants' road for the insertion of the frogs, or in putting in the frogs, shall be done under the direction and in accordance with the instructions of a manager, to be appointed by the court, whose duty it shall be to see that all the work is done in such manner and at such times as will, in his judgment, cause the least possible injury to the defendants' property and business. The manager will, if possible, so conduct the work of inserting the frogs that no interrup-

tion in the running of trains over the defendants' road, according to existing arrangements, shall occur.

Condemnation by One Railroad of a Crossing Over Another.—See National Docks and N. J. Junction Connecting R. Co. *v.* State (N. J.), 47 Am. & Eng. R. Cas. 87, note 97.

Crossing of Two Railroads—Grant of Right of Way—Rights of Senior and Junior Companies—Enjoining Construction of Side Track.—Where a railroad company entered into an agreement with another company whereby the latter acquired the right, upon certain considerations named, to construct its railroad across and over the ground and across the main and side tracks of the senior company at Marion, Indiana, and after making such agreement, the senior company permitted the junior company to locate its right of way and construct its track over a strip of ground owned by the senior company, but which had not been acquired for, or devoted to, a public use by said company, the latter could not, thereafter, even though the compensation for the ground in dispute was not included in the agreement, enjoin the junior company from constructing a a side track on said strip of ground within the limits of its right of way, it not appearing that the side track would in any way, directly or indirectly, affect the operation of trains over the senior company's road, or that it would necessarily obstruct any approach to the depot or other grounds of the senior company and used in the transaction of its business. Chicago, St. Louis & Pittsburg R. Co. *v.* Cincinnati, Wabash & Michigan R. Co., 126 Ind. 513.

BIRMINGHAM MINERAL R. CO.

v.

JACOBS.

(*92 Alabama 187.*)

Railroads Crossing Each Other—Application of Statute to "Dummy Line."—A railroad connecting two cities operated with dummy engines, is a "railroad" within the terms of a statute (Code Ala., § 1145), which requires trains on railroads which cross each other, to stop within one hundred feet of such crossing. (STONE, C. J., and CLOPTON, J., dissenting).

Statutory Provisions as to Railroads Crossing Each Other—Duty to Stop Trains.—Where it is provided by statute that when the tracks of two railroads cross each other, engineers and conductors are required to stop their trains within one hundred feet of the crossing "and not proceed until they know the way to be clear," the fact that the stoppage of a train within one hundred feet will leave the cars in the rear standing on the crossing of a third railroad, does not excuse the failure to perform this duty.

Action for Death—Allegation That Injuries Were "Willfully" Inflicted—Variance.—In an action for death, where it is averred that the injuries which resulted in death were "willfully" caused, no recovery can be had on proof of mere negligence; but a count, which avers that the defendant's train was willfully run at a high rate of speed toward a crossing on which another engine was standing, is not equivalent to an averment that the collision resulting therefrom was willfully caused.

APPEAL from Jefferson Circuit Court.

This action was brought by Hannah Jacobs, as administratrix of the estate of Peter Jacobs, against the Birmingham Mineral Railroad Company, to recover damages for the alleged negligent killing of her intestate. The deceased was the engineer of the Ensley Dummy Railway Company, and the injury was caused by the collision of the defendant's train of cars with the dummy engine at the crossing of the two roads. Act Ala. Feb. 25, 1887, § 1, p. 144, amending section 1918 of the Code of Alabama, provides the manner in which "any number of natural persons associating to form a corporation for the purpose of constructing and using a street railroad in, or in and near, or between any of the cities or towns of this state," may be incorporated. From a verdict and judgment for plaintiff defendant appeals.

Hewitt, Walker & Porter, for appellant.

Bowman & Harsh, for appellee.

COLEMAN, J.—The important question involved in this case is whether the Ensley Railway Company is a railroad within the meaning of section 1145 of the Code of 1886, which reads as follows: "When the tracks of two railroads cross each other engineers and conductors must cause the trains of which they are in charge to come to a full stop within one hundred feet of such crossing, and not proceed until they know the way to be clear." It is contended that this law does not apply to the Ensley Railway Company. The purpose of the statute was to guard against collisions at these crossings. Prior to the adoption of the Code of 1886 the distance within which trains were required to stop was fifty feet, and the distance was extended to one hundred feet on account of the difficulty of controlling the large engines and heavily loaded trains. The purpose of the statute, as we have said, is to prevent collision, and the fact that engines and trains, by reason of their structure and appliances, are more easily managed than others, and may be stopped within a distance of twenty, thirty, or fifty feet, is no reason why the law should not apply to them.

Application of statute to dummy railroad.

It may be conceded in argument that there are many sections in the Code applicable to railroads which do not and were not intended to apply to street railways. We hold that the Ensley Railway Company is not a street railway, within the meaning of the constitution and the statutes which provide for the incorporation, organization, and government of street railways, but that it is a "railroad company" within the meaning of section 1173 of the Code of 1886.

The constitutional provision is as follows: "No street passenger railway shall be constructed within the limits of any city or town without the consent of its civil authorities." Code, p. 49, § 24. The statute laws pertaining to street railways are found in chap. 7, tit. 1, of the Code of 1886, beginning with section 1603 and ending with section 1612, and, so far as respects the question under consideration, are substantially the same as section 1917 to 1929, inclusive, of the Code of 1876. Section 1603 of the Code of 1886 reads as follows: "Corporations for constructing, maintaining, and operating street railways in a town or city may be formed in the mode prescribed, and have the capacity and powers in this chapter expressed." It is evident from the constitution, and from this section and those which follow, that street railways here intended are only those to be formed, maintained, and operated in a town or city. The phraseology of the law, the location, uses, and purposes contemplated of street railways, and their subjection to municipal ordinance, lead to this conclusion.

The Ensley Railway Company is not included within this class of corporations, or within the meaning of "street railways," as defined by Elliott in his excellent work on Roads and Streets. See pages 557-560. Its lines extend beyond municipal corporation control, and its corporate existence, authority, and powers are not derived from or subject to municipal regulations. It was incorporated and organized by virtue of an act of the Legislature adopted Feb. 25, 1887, p. 144. Until the adoption of this act there was no law which authorized the formation of a corporation like that of the Ensley Railway Company. The second section of the act reads as follows: "Section 2. Be it further enacted that section 1921 of the Code of Alabama be amended so as to read as follows, namely: 'Section 1921. Road located by authorities of cities or towns and counties; power to make and alter contracts: Such corporation shall have power to construct, maintain, and use a street railroad upon the streets and upon the lines and between the termini named in the certificate in any city or town, upon such terms and in such manner as may be authorized by the ordinance or other lawful act of the proper authorities of such city or town, and upon any of the public roads of any county, upon such terms and in such manner as may be so authorized by the proper authorities of such county; and such railroad company may contract with such counties, cities, or towns therefore, and the contract may be altered when both parties agree to the change.'" Before the adoption of this act it must be admitted there were no street railways in the

state outside of the corporate limits of a city or town, and none were contemplated by the then existing laws.

A railroad organized under this Act of the legislature, running beyond the corporate limits of any city or town and through counties, is not, and necessarily cannot be, a street railway, within the meaning of the constitution and the provisions of the Code in regard to street railways. Except as to its termini, it is entirely independent of municipal control. It derives its corporate powers and existence under the Act of the legislature, after leaving the city boundaries, by contract with the counties through which it runs. There is no limitation to the extent of such a road. Under its provisions a road could be constructed from Huntsville to Mobile, traversing the entire length of the state. There is no limitation upon the power and character of the propelling force, or the business to be conducted. It is common knowledge that railroads incorporated under this Act, having in use heavy dummy engines, run from Birmingham to Bessemer City, and to other parts of the state, traversing wide scopes of country with regular stations, soliciting patronage, and competing with other railroads in carrying both freight and passengers. The very Act itself, in the second section, no longer designates railroads organized under its provisions, after they leave the corporate limits, as street railways, but as "railroad companies." They are engaged in the same business as other roads, and propelled by the same dangerous power of steam, and attended with the dangers incident to the operation of other railroads. Is there any reason why such roads should not provide comfortable depots for passengers in the country, and have their freight rates regulated, where they carry freight, and be taxed as other railroads engaged in like business? Is there any reason why they should not be required to put up signboards, and ring signal bells, and stop their trains at public road crossings and at railroad crossings, and observe all the safeguards required of other railroads to prevent collisions and for the protection of human life? Is it reasonable to hold that, because of the structure of dummy engines, many of these regulations can be observed and complied with by those in control of them, more easily than other engines, therefore they shall not obey them at all? After leaving the city limits, as we have shown, they are no longer street railways, subject to municipal regulations, and if not railroads, within the meaning of the general law, we may well inquire what kind of railroads are they and by what laws are they governed? Can it be presumed that the legislature intended to provide for the incorporation of a species of railroad companies "*sui*

generis" not subject to any law except the common law for common carriers, while the duties and liabilities of all other railroad companies are regulated and controlled by statutory enactments?

We are of the opinion that the Ensley Railway comes directly within "railroad companies" as defined by section 1173 of the Code of 1886, and which is as follows: "Sec. 1173. Meaning of 'railroad company:' Unless clearly otherwise apparent from the context, the term 'railroad company,' as used in this chapter, includes any person or corporation owning or operating a railroad." This statute is broad and comprehensive. There is nothing in this section to indicate that the number of incorporators, or the manner of the organization, enters into the definition. The only exception is, where it is "clearly otherwise apparent from the context." We should say a horse-car is not expected to carry a steam-whistle, and for obvious reasons would be clearly excepted. Section 1145, which requires engineers and conductors to stop their trains where two railroads cross each other, is included in the chapter referred to in section 1173.

The Act of February 28, 1889, 1020, enlarging the charter, and conferring additional powers on the Ensley Railway Company, strengthens our position. That Act declares, among other things: "The Ensley Railway Company shall have and possess all rights, powers and privileges and immunities of the general laws of this state conferred on railroad companies." It must be admitted that this Act in no way changes the character of the engines used, the business of the company, or creates a necessity for having depots, or the ringing of bells, blowing of whistles, or stopping at public road crossings or railroad crossings, which did not exist before its passage. It cannot be contended that the effect of this Act was to change the relation of the road to the cities or towns in which are located its termini, or its relation to the country through which it passes, and the contract with the cities and county under which it was incorporated and organized. The number of incorporators and the mode of organization remains the same.

The Act may have been passed out of abundant caution, or for some purpose not developed on this trial, but we can see no reason why the Act of the legislature should bring the Ensley Railway within the definitions of "railroad companies," as given in section 1173 of Code 1886, *supra*, which did not exist prior to its passage. There was nothing in its incorporation, its motive power, its business and location, to exclude it from this section. Whether the Act of February

25, 1887, is obnoxious to the constitutional provision of article 4, § 2, which declares that "each law shall contain but one subject, which shall be clearly expressed in its title," is not determined, because it is not deemed necessary to a decision of the question before us. See *Ex parte* Reynolds, 87 Ala. 138; *Ex parte* Cowert, 92 Ala. 94.

After a careful consideration of the question, the majority of the court is of the opinion that the trial court did not err in holding that section 1145 of the Code applied to the Ensley Railway Company. The court is unanimous in all other respects.

Since writing the foregoing opinion we have been furnished with a certified copy of an opinion recently delivered by the supreme court of Tennessee in the case of Katzenburger *v.* Lawo, Tenn. 16 S. W. Rep. 611, by LURTON, J. In that case the court holds that dummy engines, whether operated within or beyond the municipal limits, are subject to the general statutes regulating and prescribing duties for the government of railroads, to prevent accidents and injuries. The court uses the following language: "A train pulled by a small engine called a 'dummy,' although exclusively engaged in carrying passengers, is a railroad, within the meaning of the statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railways as to the ordinary railroads of commerce." We cite the case as an authority fully in accord with the conclusion reached by a majority of this court.

It is unnecessary for us to go further than the principles declared in our opinion, *supra*; and consequently we express no opinion as to whether, under our statutes, dummy engines operated wholly within and under municipal control are subject to the general laws governing railroad companies as defined in § 1173, Code 1886. Reversed and remanded.

STONE, C. J.—The intestate of plaintiff in the court below, Peter Jacobs, was in charge, as engineer, of a dummy engine and train of two cars, which was making a trip over the dummy line between Birmingham and Ensley City. The track of that line crosses the track of the appellant corporation, and, at the crossing, intestate, while at his post of duty, was struck and killed by a train which was being pushed backward over the track of the Birmingham Mineral Railroad Company. The suit is against the railroad corporation, and charges that the collision and injury resulted from the negligence of the Birming-

Facts.

ham Mineral Company. Possibly the most important charge of negligence consists in the alleged fact that the train of the Birmingham Mineral was not brought to a full stop within 100 feet of the crossing of the railroad and dummy tracks. Code 1886, § 1145. One defense to the action is contributory negligence. The trial court, in its rulings, treated the dummy line as a railroad, within the meaning of section 1145 aforesaid. There was a recovery in favor of the plaintiff.

It is contended for the appellant corporation that a dummy line is not a railroad, within the meaning of the statute, and that therefore it owed no duty to bring its train to a full stop before crossing the dummy track. If this point be well taken, there can be no question that the circuit court erred in several of its rulings. But, as we do not intend to consider this question until we shall have disposed of the other questions raised, we need see no more on this point at this place.

Moving in the direction the appellant's train was coming, it would first encounter, and must needs cross, the main track of the Kansas City, Memphis & Birmingham Railroad Company. Between that track and the track of the dummy line is a space of only 325 feet. The approaching train consisted of fourteen cars besides the engine and tender,—much longer than the space between the two tracks. The uncontroverted testimony is that, if the train had stopped at any point within 100 feet of the dummy track, its rear section would have overlapped the track of the Kansas City, Memphis & Birmingham track by four or five car-lengths,—more than 100 feet. This, it is contended, must operate an exception to the statutory requirement, and relieve the railroad company from the duty of stopping before crossing the second track.

Duty to stop train at crossing.

The statute in question is a very wise and humane exercise of the state's police power. It is of very easy observance; and, if faithfully and thoughtfully conformed to, no such thing as a collision of trains at a railroad crossing could occur. Each train must come to a full stop within 100 feet of the crossing before attempting to cross. It must not only be brought to a full stop, but it must "not proceed until they know the way to be clear." The statute then declares which road shall have the preference in crossing,—the one having "the older right of way." So the duty of learning that the way is clear before proceeding, is equally as binding as is the command to come to a full stop. The purpose of the required stop is that the situation may be taken in; and if the officer or agent having control of a train were merely to

go through the perfunctory ceremony of coming to a stop, and were then to proceed without informing himself that the way is clear, he would be as derelict in duty as if he had not brought his train to a stop.

We cannot adopt the interpretation contended for. It is not within our province to disregard so positive language of the legislature, nor do we think policy points in that direction. To disregard the statute is to make collisions possible, if not probable. To obey it is to render them impossible. If it were made a highly penal offense in all persons controlling trains who fail to observe this statutory enactment, such collisions would probably be much less frequent.

Charge of "willful" negligence.

The first count of the complaint charges that the defendant, "by and through its conductor, engineer, servants, and agents, negligently, wantonly, recklessly, and willfully caused, permitted, and suffered its said train to run into and against the said engine upon which plaintiff's intestate was as aforesaid, knocking it off the track, and so scalding, bruising, and wounding plaintiff's interstate that he died in consequence thereof." This count in terms charges that the defendant's train was willfully caused to be "run into and against the said engine" of the dummy line. There is no testimony tending to show that the collision was "willfully caused" by defendant's servants, but the trend of the whole testimony repels such inference. The defendant's sixth charge, which was refused, was confined to the first count of the complaint, and in effect asserts that the plaintiff failed to establish the truth of that count. This is the identical question which was raised and ruled on in Johnston's Case, 79 Ala. 436. While the point may be somewhat technical we do not feel at liberty to depart from the ruling then made. The sixth charge asked ought to have been given. Dickson's Case, 88 Ill. 431, 1 Greenl. Ev. §§ 51, 63; Coulton's Case, 86 Ala. 129, 458; Guinan's Case, 11 Lea (Tenn.) 98.

The second count does not charge that the defendant willfully caused the collision. The charge is that the train was willfully run at a high rate of speed "towards and to said crossing. This is an entirely different question, which does not fall within the rule declared in Johnston's Case, *supra*.

Was the dummy line a "railroad."

We recur to the question first raised: Was the Ensley Railway a railroad, within the meaning of section 1145 of the Code of 1886? Was its track such a one as that, before crossing it, the train of the defendant railroad must be brought to a "full stop," with no authority to proceed until those having it in charge knew the way to be clear. This question, it would seem,

does not necessarily depend on a partial resemblance of the Ensley Railway to railroads proper. It depends on the will and intention of the legislature, to be gathered from its language. Much light will be shed on this subject by tracing our legislative history which bears upon it.

The clause which now constitutes section 1145 of the Code of 1886 was enacted December 10, 1864. Sess. Acts 1865-66, p. 77. That clause has undergone no change since its enactment, with this exception. When first enacted, the train was required to be brought to a full stop within 50 feet of every railroad crossing. The Code of 1886, § 1145, fixes the maximum of the distance at 100 feet. There is much testimony tending to show that the train of the Birmingham Mineral Railroad Company which collided with the dummy engine, of which deceased was the engineer, was not brought to a full stop within 100 feet of the track of the Ensley Railway. So, if the Ensley Railway was at the time of the collision (February 22, 1889) a railroad, within the meaning of the statute, the jury were not without testimony on which to find that that feature of plaintiff's case was made good.

Our statutory provisions in reference to the government, regulation, and supervision of railroads have been of steady growth, dating far beyond the introduction of dummy engines as tractors of streets cars. They are embodied in the Code of 1886, commencing with section 1120 and ending with section 1173. The whole of chapter 2, tit. 12, pt. 1, of the Code, is devoted to this subject. What is now section 1144 of the Code 1886 was enacted February 6, 1858. Sess. Acts 15. It constitutes section 1399 of the Code of 1867, and section 1699 of the Code of 1876. Section 1145, as we have seen, was approved December 10, 1864. In the Code of 1867 it is section 1403, and in the Code of 1876, § 1702. On December 29, 1868, (Sess. Acts 462,) the law was approved requiring railroad companies to erect at each crossing of a public road a sign, "with large and distinct letters," giving notice of the proximity of the railroad, etc. This statute is embodied in section 1722 of the Code of 1876, and is section 1146 of the Code of 1886. One provision of the act approved December 10, 1864, requires that "the chief superintendent of every railroad shall instruct the engineers and conductors thereof as to the provisions of" what now are §§ 1144, 1145, of the Code of 1886. Code 1867, § 1405; Code 1876, § 1703. So, in the act approved December 29, 1868, it was provided "that every railroad company in this state shall cause all its trains of cars for passengers to stop upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains at least one-half of one minute."

This is section 1721 of the Code of 1876; section 1157 of the Code of 1886. Railroads must have proper depot accommodations "at each of the passenger stations along the line of the railroad." Sess. Acts 1882-83, p. 154, 1886-87, p. 74; Code 1886, § 1154.

The act creating a railroad commission for the state of Alabama was approved February 26, 1881. Sess. Acts 84. Its title is, "to provide for the regulation of all railroad companies and persons operating railroads in this state." It was certainly intended to apply, and does apply, to all railroads in the state, as the legislature understood that phrase. The powers it confers on the commissioners are comprehensive. They are embodied in the Code of 1886, §§ 1120 to 1143, inclusive.

To comment on all the statutory provisions relating to the railroad commissioners and their powers which apparently shed light on the question we are now considering, would swell this opinion unduly. To be fully comprehended the entire statute must be read. Certain provisions of that statute, as well as many statutory provisions noted above, seem not to be properly adapted to street railroads or dummy lines, which, as a rule, are constructed for the transportation of passengers for short and irregular distances. We will mention only some of the most striking provisions, in the enactment of which the legislature, it would seem, could not have intended their application to street railways, whether drawn by a dummy engine or otherwise.

Section 1145 of the Code requires trains to be brought to a full stop before crossing another track. There could be no question that the difficulty if not the impossibility of stopping an ordinary train of cars on an ordinary railroad within any short distance, and the consequent danger of a collision, supplied the motive of this enactment. That reason cannot apply to a dummy engine and its train, which, under all the testimony, can be stopped in from 10 to 30 feet. Any one reading sections 1144, 1146, 1154, 1161, 1164, will readily perceive their inapplicability to street railways, even though drawn by a dummy engine; and it is not perceived how section 1148 can be made to apply to street railways.

If street railways whose cars are drawn by dummy engines are thereby constituted railroads under our general statutory system, then they must be brought under all the legislative enactments for the government of railroads. This will subject them not alone to the legislative provisions noted above. Its influence has a much wider sweep. They would cease to be taxable as the great bulk of property is taxed, but must be assessed under section 494 of the Code by the state board of

assessment, with all the formality required in that section. Does the reason which caused that enactment apply to street railways and dummy lines?

Again; if they are railroads under our statutes, they are under the power and jurisdiction of the railroad commission. Code, § 1129. They would be required to pay a license tax. and their share of the expenses of the railroad commission, to be ascertained by the auditor. Code, § 1128. It would subject their tracks to supervision by the railroad commissioners, and require them to transport the commissioners free of charge. Section 1129. Their tariff would be subject to revision by the commissioners. Section 1130. Can it be possible that dummy lines are subject to the provisions requiring railroads to have "at each of the passenger stations along the line of its railroad * * * sufficient sitting or waiting rooms * * * for passengers waiting for trains, having regard to sex and race, which shall be suitably heated in cold weather, and supplied with sufficient fresh drinking water, when passengers waiting for trains are present, and with sufficient and comfortable seats?" Section 1154. Confining the legislation we are discussing to railroads proper, every clause in the 54 sections (1120 to 1173, inclusive) is germane and proper. Extending it so as to take in street railway service, no matter how propelled, we are forced to declare that many of the more important provisions of the statute are wholly unsuited to the new service assigned them. We are on safe ground when we give to the statutes such operation as the legislature had, and could only have had, in contemplation when the statutes were enacted. We should hesitate before extending them to conditions essentially dissimilar.

The difficulties of interpretation extend farther than is suggested above. If street railways which employ dummy engines as motors are railroads, what are similar roads whose coaches are propelled by electricity or by animal power? The tracks are alike, and the coaches, supported on flanged wheels, run only on the rails, as do the coaches of railroads proper. Are some street railways "railroads," under our statutory system, and others not? And, if so, what class or classes are included, and what excluded?

But we are not left in doubt as to what the legislature intended. The statutory provisions in reference to the incorporation of railroads commence with section 1573 of the Code of 1886. There must be at least seven corporators, and the declaration must be filed with the secretary of state. Section 1574. The secretary of state issues the commission to open books of subscription, (section 1578,) and keeps a record

of it, (section 1579.) Such corporations have very many and large powers peculiar to railroads proper, which are wholly inadapted to dummy lines. To state them in detail would swell this opinion to unreasonable dimensions. We invite attention to the following sections of the Code: 1580-1583, 1586, 1588, and 1594. And we also invite attention to constitutional provisions.

Street railway companies are treated as a separate subject, and a chapter of the Code is devoted to it, commencing with section 1603. Five or more persons constitute the requisite number of subscribers to obtain such incorporation. Section 1604. The judge of probate issues the commission for opening books of subscription, (section 1605,) and the record of the proceedings is made and kept in his office, (section 1607.) The powers of the corporation are set forth in section 1608, and are essentially unlike those conferred on railroad corporations proper. These statutory provisions are in several respects unlike those theretofore in force. Code 1876, § 1917 *et seq.*

At the session of the legislature of 1886-87 before the publication of the Code of 1886, several of the statutory provisions found in the Code of 1876 were changed. By act approved December 10, 1886, p. 122, street railways were given the right to condemn private property to corporate purposes. By act approved February 25, 1887, p. 144, sections 1918 and 1921 of the Code of 1876 were very materially changed. The language of these sections before the amendment authorized such incorporations only "in any of the cities or towns of this state." The amendment enlarged the privilege, and authorized the formation of such corporations "for the purpose of constructing and using a street railroad in, or in and near, or between any of the cities or towns of this state." This is, in point of time, the first legislative authority for constructing a street railroad outside of a city or town. It cannot operate on any railroads except street railroads, for its caption is, "To amend sections 1918 and 1921 of the Code," and those sections are in the article of the Code devoted exclusively to "street railroad companies." Any attempt, under that caption, to legislate on any subject other than that of the sections amended,—street railroads,—would render the enactment unconstitutional and inoperative. *Ex parte* Reynolds, 87 Ala. 138. *Ex parte* Cowart, 92 Ala. 94.

There was a further amendment of sections 1917 and 1923 of the Code of 1876 by act approved February 28, 1887. Sess. Acts 149. The effect of this amendment was to reduce the requisite number of subscribers or promoters of a street railroad corporation from five to three. All of these enact-

ments have special reference to street railroads, and cannot, by the most latitudinous construction, be made applicable to railroads in the larger sense. It will be remembered that the collision which caused the death of plaintiff's intestate occurred February 22, 1889. Six days afterwards (February 28, 1889) the act was approved. "To amend and enlarge the charter of the Ensley Railway, and to confer additional powers on said corporation." Sess. Acts 1020. That act, among other things, declares that "the Ensley Railway shall have and possess all the rights, powers, privileges, and immunities by the general laws of this state conferred on railroad companies." Why was that act necessary, or considered necessary, if the Ensley Railway was already a "railroad" under the general laws of the state regulating railroads proper?

In the recent excellent work on Roads and Streets by Elliott, (pages 530 and 557 *et seq.*,) there will be found a very full, and in many respects an able, discussion of the proper classification of street railways which extend beyond city limits, and in some cases connect one city with another. That work, however, had mainly two aims in handling the question: *First*, to ascertain whether the construction of a street railway along a public street is the imposition of a new servitude, for which the owner of the ultimate fee is entitled to additional compensation; and, *second*, to what extent the use of steam as a tractor enters into the inquiry. The conclusion is reached that the street railways which employ only animal power impose no additional servitude which justifies the demand of additional compensation, but, if steam be used, then the increase of annoyance and danger consequent upon it calls for further damages. It is further stated as a reason for a distinction that street railways whose cars are moved only by animals are not clothed with any powers of eminent domain, whereas those which employ steam may condemn private property for their use.

Eminent domain is purely an attribute of the sovereignty, and can be exercised alone by it, or by some person, natural or artificial, under legislative grant of the power. With the exception of a single provision for private roads in the constitution of Alabama, art. 1, § 24,) it is only in promotion of enterprises of a public nature that the sovereignty can exercise, or grant the power to another to exercise, the right of eminent domain. Sadler *v.* Langham, 34 Ala. 311. Can it be maintained that street railways, even those extending from city to city, if their cars be moved by steam-power, possess this element of public benefit which authorizes them to invoke and employ the sovereign power of eminent

domain, while the less pretentious horse or mule car can aspire to no such eminence? No person, natural or artificial, can assert the power of eminent domain, unless that power is conferred by legislative grant, and in some matter which has in itself an element of acknowledged public benefit. Can it be affirmed that street railways which employ steam as a motor possess that element, and that those which employ horses or mules do not? Is not the true inquiry, at last, whether the service accommodates the public with a ready and inexpensive means of transportation, within the area of customary business calls, and whether the legislature has conferred upon it the power of eminent domain?

We have traced this legislative history for the purpose of showing that from the inception two systems have been declared,—one for the regulation of railroads proper, and the other for the regulation of street railways. That there is a natural, inherent, organic difference in the two systems, and their wants, we need scarcely assert. Is it not necessarily true that, if some of the provisions in reference to railroads apply to dummy lines, all must apply to them? By what statutory authority can we apply regulations to one which are designed for the other? And, if we do so apply them, to what extent shall the application be made? Who shall determine this question, and by what criterion shall it be determined? Is it not safer to leave this delicate duty to the law-making power? It may be that it would be wiser and safer to require railroad trains to be brought to a full stop before crossing a dummy track. Let the legislature determine that grave question.

Whether, at the time of the injury complained of in this suit, the track of the Ensley Railway Company was a "railroad," within the meaning of section 1145 of the Code, is a question on which the members of this court are not agreed.

It is contended by the majority of the court, as shown in Judge COLEMAN'S opinion, that section 1173 of the Code, tends to support their view. That section declares that, "unless clearly otherwise apparent from the context, the term 'railroad company,' as used in this chapter, includes any person or corporation owning or operating a railroad." I think that section has nothing to do with the question. My own opinion is that the only object of that section was to fasten responsibility on any person or corporation operating a railroad, whether such person or corporation owned the road or not. Under its provisions, any person having a cause of action traceable to the running of the road, or handling of its rolling stock, is not necessarily confined to the corporation as chartered or to the owner of the road for

redress. He may proceed against any person or corporation operating the road, if the grievance complained of was suffered at the hands of such person or corporation, although not the owner of the track. It is common knowledge that railroads are sometimes operated under lease, and that two or more railroad companies sometimes, under an arrangement between themselves, use the same track for a part of their respective lines. Under this section of the statute, liability attaches to the particular person or corporation whose breach of contract or tort is complained of.

My own opinion is that section 1145 of the Code is a strong argument in favor of my position. Under its terms, it is shown that it was not intended to apply to the Ensley Railway Company. This is "clearly apparent from the context." That section is part and parcel of the system established for the government of railroads proper, as we have heretofore shown. It is both preceded and followed by statutory provisions which are palpably inapplicable to the Ensley Railway or any other dummy line. This is the context which makes it clearly apparent that the provisions of the chapter in which section 1145 is found do not and cannot apply to the Ensley Railway.

On the other hand, the Ensley Railway was incorporated, not under the statutes devoted to railroads and their regulation, but under an amendment of the statutes devoted specially and separately to street railways and their regulation. How can the conclusion be resisted that the context clearly shows that none of the provisions found in the system devoted to railroads proper are applicable to street railways or dummy lines which are chartered under and governed by an entirely different statutory system, with entirely different objects, powers, regulations, and methods of service? If regulations enacted for railroads are applicable to street railways and dummy lines, why are not the regulations of street railways and dummy lines equally applicable to railroads proper? Should not the rule work both ways, to be consistent?

My own opinions are expressed above, and Judge CLOPTON concurs with me. The opinion of the majority of the court is expressed by Judge COLEMAN. According to that opinion, there is no error in the rulings of the circuit court, save the single one pointed out above.

Application to Street Railways and Dummy Lines of Statutes Referring to "Railroads" Generally.—In a technical sense a street railway is not a "railroad." Louisville & P. R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 178. But the safe way to determine whether the words "railway" or "railroad" or "common carrier," as used in legislative acts, are to be con-

fined to railroads operated by steam, or railroads operated by other power, such as street railways, is to look at the context and intention of the legislature. Thomas & Houston Electric Co. v. Simon, (Ore.) 47 Am. & Eng. R. Cas. 51. Very little aid in the determining of this question can be derived from the use of the two words "railroad" and "railway"; but if there is any distinction to be made in the use of these words, it is perhaps this; that the word "railway" is more usually applied to local roads operated by electricity or horse power or by dummy engines, while the word "railroad" is more frequently applied to the ordinary steam railroad. But in a legal sense the terms railway and railroad have no different signification. They are defined synonymously in the dictionaries and are used in the same sense in the common language of men. In a single statute the terms are frequently used indiscriminately as indicating the same thing. Thus, in Pennsylvania it has been held that street passenger railways are included within the terms "railroads" employed in the act of May 16, 1861, and that the provisions of that act relating to merger apply to such railways. Hestonville M. & F. Passenger R. Co. v. Philadelphia, 89 Pa. St. 210. And in the same state it is held that the use of the term "passenger railway" in the title of an act incorporating a railway company does not restrict the franchise conferred to the operation of a railroad on the streets of a municipality, without authority to carry anything but passengers, or to use steam cars or the kind of rails appropriate therefor. Borough of Millville v. Evergreen R. Co., 131 Pa. St. 1, 46 Am. & Eng. R. Cas. 219. Although, in an earlier Pennsylvania case, a distinction between passenger railway companies and railroads generally was apparently asserted of such a character as that legislation intended for one class could not embrace the other. Commonwealth v. Central R. Co., 52 Pa. St. 506. And the same court has held that a constitutional provision forbidding the consolidation of "railroads," was not applicable to street railways; that this distinction was a necessary sequence from the context of the article of the constitution in which the terms were used. Gyger v. Philadelphia City Passenger R. Co., 136 Pa. St. 96, (fully abstracted 46 Am. & Eng. R. Cas. 229). It was said in this case that the constitutional convention did not regard the word "railroad" as synonymous with "railway" or "street passenger railway" when the constitution was framed.

In Oregon it is ruled that the provisions of the statute for the condemnation of a railroad right of way have little or no reference to a corporation organized for street railways propelled by electricity or horse-power for local convenience, or the transportation of passengers, and do not authorize such to condemn property for a right of way. Thomas & Houston Electric Co. v. Simon (Ore.) 47 Am. & Eng. R. Cas. 51. And in Washington it is said that a lien for labor performed cannot be maintained upon a street railway under a statute giving a laborer's lien on a "railroad" or any other structure and the land upon which it is erected. Front Street Cable R. Co. v. Johnson, (Wash.) 47 Am. & Eng. R. Cas. 287. But in Missouri it seems that a contrary ruling has been made, and the statute giving a lien upon railroads has been made to apply to horse railways laid in the streets of cities. St. Louis Bolt & Iron Co. v. Donohoe, 3 Mo. App. 559. And in Georgia it is held that the term "railroads" in a statute prohibiting the obstruction of railroad tracks, includes street railways. Price v. State, 94 Ga. 378. And in Illinois a statute giving certain powers to railroads has been held to embrace horse railways. Chicago v. Evans, 24 Ill. 52.

A statute making the "proprietors of any railroad liable for any injuries caused by the negligence of its servants," etc., was held to include horse railroad companies. Johnson v. Louisville City R. Co., 10 Bush.

(Ky.) 231. But where the legislature enacted that no other railroad than that of a certain corporation should be constructed within certain prescribed limits, and that any railroad, which might be constructed in any direction, should connect with the road of such corporation on reasonable terms, it was held that the term "railroad" did not comprise street railways, and that an injunction could not be granted restraining the construction of a city railway, or requiring the connection of such railway with the road in question. Louisville & P. R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175. And in New York it is held that the penal action given by the laws of N. Y., 1857, against railroad companies demanding fares in excess of the rate allowed by law, does not apply to street railroads. Moneypenny *v.* Sixth Avenue R. Co., 4 Abb. Pr. N. S. (N. Y.), 357.

A "dummy" railway laid in the streets of a city and engaged exclusively in carrying passengers, has been held to be a "railroad" within the Tenn. Code, § 1298, requiring every railroad to keep some person upon the locomotive always upon the lookout ahead, and when any obstruction appears upon the road requiring the alarm whistle to be sounded, and every possible means to be employed to prevent an accident. Katzenberger *v.* Lawo, (Tenn., May 7, 1891) 16 S. W. Rep. 611.

DOOLITTLE

v.

SELECTMEN OF TOWN OF BRADFORD.

(*59 Connecticut 402.*)

Removal of Grade Crossing—Apportionment of Expenses Between Railroad and Town—Order of Commissioners.—Under a statute relating to the removal of grade crossings and providing that the railroad commissioners, on the removal of a crossing, shall determine at whose expense the removal shall be made, except that in no case shall more than one-half the expense be paid by the town, city, or borough, in which the highway is situated, with the right to apportion it between the railroad company and the town, an order of the railroad commissioners, made before the work of removal was done, that the town should, on its completion, pay a gross sum towards the cost of a bridge over a railroad track to be constructed by the company, is valid.

Same—Power of Commissioners to Change Location of Highway.—The railroad commissioners, when they find it necessary to the removal of a grade crossing, may order a change of the location of any existing highway, although such change involves the construction of short portions of highway, and such action is not an interference of the general power of towns as to laying out new highways.

Mandamus to Enforce Order of Commissioners—Application in Name of State's Attorney.—Where the removal of a grade crossing of a railroad involves the construction of a short portion of a new highway by way of alteration of an existing highway, a question of public concern is involved, and the state's attorney is the proper party to apply for *mandamus* to compel the town selectmen to act.

Review of Commissioners' Decision on Application for Mandamus.—The question as to whether public safety requires the removal of a railroad crossing over a highway at a grade, being for the decision of the railroad commissioners, their decision upon such point can only be reviewed on

appeal therefrom, and cannot be questioned on *mandamus* to the selectmen of the town to carry out the order of the commissioners.

Notice of Commissioners' Decision to Town Authorities.—The authorities of a town, who are parties to proceedings before the railroad commissioners to remove a grade crossing, and who have been notified of the decision of the commissioners, are bound to take notice of the contents of that decision as filed in the office of the commissioners, which is a public office, and cannot be heard to allege their ignorance, on proceedings by *mandamus* to enforce such order.

Parties to Proceedings by Mandamus—Selectmen of Town.—The selectmen of a town are proper parties defendant to proceedings by *mandamus* to enforce an order of the railroad commissioners requiring towns to repair approaches to a bridge necessitated by the removal of a grade crossing.

Application for Mandamus—Necessity for Verification.—In applications for *mandamus*, brought by a public officer for the enforcement of public rights, no affidavit of verification is required.

Pleading—Admission of Facts by Demurrer.—A demurrer admits only such facts as are well pleaded for the purpose of the demurrer, and where the demurrer is sustained the facts in the pleading demurred to are not in the case.

APPEAL from New Haven Superior Court.

Application for *mandamus* to compel the selectmen of the town of Branford to perform the order of the railroad commissioners concerning the removal of certain grade crossings of certain highways. The writ was granted, and the selectmen appeal.

H. Stoddard and *J. W. Bristol*, for appellants.

L. Harrison, for appellee.

ANDREWS, C. J.—For fully twenty years the legislature of this state has been devising laws to prevent the destruction of human life at railroad crossings of highways. Disasters, frequent and sometimes appalling, have been happening at such crossings ever since railroads have been built, and the legislature has been seeking from time to time to frame enactments by which they should be avoided. These acts appear in the public acts of 1870, chap. 125; Acts 1873, chap. 67; Acts 1876, chap. 36; Acts 1877, chap. 8; Acts 1883, chap. 107, and Acts 1884, chap. 100. The Act of 1884 intended to make provision for the entire removal of all the grade crossings in the state with all convenient rapidity. It gave full power to the railroad commissioners, and virtually said to them: "Make such alterations of highways at their crossings of railroads at grade as you shall deem best, but have the grade crossings removed." In 1888 the provisions of all the then existing acts were brought together into one section, which is section 3489 of the General Statutes; and this has been further reinforced and made emphatic by the Act of 1889, chap. 220.

Statutory Provisions.

In the light of these reiterated expressions of the legisla-

tive will it is undeniable that it has become the settled policy of the legislature to abolish grade crossings. This policy has been recognized and seconded by the courts in numerous cases. Town of Suffield *v.* Northampton Co. 53 Conn. 367; Woodruff *v.* Catlin, 54 Conn. 277; New York & N. E. R. Co. *v.* City of Waterbury, 55 Conn. 19; Town of Westbrook's Appeal, 57 Conn. 95, 37 Am. & Eng. R. Cas. 446; Town of Fairfield's Appeal, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689. Of the Act of 1884 this court, in Town of Westbrook's Appeal, at page 104, 57 Conn., 37 Am. & Eng. R. Cas. 453, said: "Its object is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property. The remedy consists in requiring those charged with the duty of maintaining highways to change the conditions, and hereafter discharge their duties in such a manner as to avoid the danger." And of the purpose of the acts this court, in New York & N. E. R. Co. *v.* City of Waterbury, *supra*, at page 24, 55 Conn., said: "In fact, such crossings are public nuisances, dangerous to human life, and no man has a vested interest in the creation or continuance of such a nuisance. In the exercise of the power of protecting human life the legislature may at any time and without notice, abate it or prevent its existence."

Legislative policy—Purpose of statutes.

The Act of 1884 is as follows: "The railroad commissioners may, when in their opinion public safety requires an alteration of any highway crossed at grade by a railroad, after a hearing had upon such notice as they shall deem reasonable to the railroad company owning or operating said railroad, and to the selectmen of the town, mayor of the city, or warden of the borough within which said highway is situated, and to the owners of the land adjoining said crossing, order such alterations in such highway as they shall deem best, and shall determine and direct by whom such alteration shall be made, at whose expense, and within what time: provided, that in no case shall more than one-half of the expense be paid by the town, city, or borough aforesaid; and provided, further, that such alterations as are made at the primary instance of the railroad commissioners shall not be ordered at the rate of more than one a year on any one railroad, except in the case of railroads now having a double track throughout their entire length."

The Act of 1884.

Pursuant to this statute the directors of the New York, New Haven & Hartford Railroad Company, on the 5th day of August, 1887, made their petition in writing to the railroad commissioners, alleging that the

Facts.

Shore Line Division of their railroad was, in the town of Branford, crossed at grade by three highways; and that public safety required certain changes in such highways, to the end that the grade crossings might be removed. The railroad commissioners, after due notice and hearing, ordered certain changes in the highways, and that they should be carried over the track of the railroad by a bridge; and further ordered "that said town shall procure the right of way for, lay out, and construct the proposed highways on the south of said railroad, and pay all the expenses thereof, including all land damages; and that said company shall build said bridge, with the approaches hereto and abutments of the same; and that on the completion thereof said town shall pay said company the sum of fifteen hundred dollars towards the cost of constructing said abutments, bridge and approaches." This order was duly made known to the railroad company and to the town and the selectmen. No appeal was taken therefrom to the superior court by any of the persons entitled to take such an appeal. It was, at any rate, acquiesced in by the town; and if we may believe the finding of the commissioners, it was agreed to by the selectmen. Afterwards, the town and its selectmen having refused and neglected to do any of the things so required by the order to be by them done, the state's attorney for New Haven county made application to the superior court in that county for a writ of peremptory *mandamus*, as set forth in the record. An alternative writ was granted, and was duly served and returned. The parties appeared, and various proceedings were had thereon in court, such that on the 13th day of May, 1890, the court ordered that a peremptory writ of *mandamus* do forthwith issue, directed to the defendants, commanding them to procure the right of way for, lay out, and construct the highways on the south side of the railroad, in a manner directed in the order of the railroad commissioners. From this order of the superior court this appeal was taken by the defendants. The appellants in their brief have grouped all their grounds of error under five heads. It will be convenient to consider these several heads in a different order from that in which the appellants have arranged them.

Power of commissioners to order town to pay gross sum.

1. The appellants' second ground of error is "that the railroad commissioners had no power to pass the specific order in question." It is objected that the order was void, for the reason that the commissioners ordered the town to pay the gross sum of $1,500 "towards the cost of the bridge, abutments, and approaches." The statute authorizes the com-

missioners to determine "at whose expense" the alteration shall be made, and this court has twice decided that there might be an apportionment of the expense between the railroad company and the town, or that the whole might be assessed on either. It would seem that the order to pay a gross sum is not invalid. It is true that the expenses to be determined by the commissioners must be the "actual" expenses, and not conjectural expenses. But if the expense is actual, the determination by whom it shall be paid may as well be made before as after the payment. It is true, also, that it would not be within their power to direct the town to pay a sum greater than one-half the whole cost of the bridge, etc. The items that would enter into the cost of the bridge, its abutments and approaches, would be known before any of the work was done with almost the same certainty as after it was finished. The number of yards of earth filling or excavation, the amount of masonry, and the quantity of iron, and the price of each, are all within the knowledge of the commissioners. Having full means of ascertaining the entire actual cost, it is not to be presumed that they ordered the town to pay a greater sum than the one-half of such entire cost.

It is further objected that "the order relative to the location, building, laying out and obtaining the right of way for the highways in question, was beyond the power of the railroad commissioners." It cannot be claimed that the commissioners have authority under the statute above recited, or by any other statute, to lay out any new highway as an independent matter. They have no such power. They cannot interfere with the general power of towns and selectmen to lay out all the needed new highways within their own limits; but they do have power to deal with existing highways. They may order a change in the location of any existing highway when such change becomes necessary to the removal of a grade crossing, although the change so ordered of necessity involves the construction of short portions of new highway—such being regarded as alterations of the old, and not as the establishment of new ways. Town of Suffield *v.* Northampton Co., 53 Conn. 367; Town of Fairfield's Appeal, 57 Conn. 167; 39 Am. & Eng. R. Cas. 689. We think the order of the railroad commissioners was valid, and that there is a clear right in the public to have it enforced.

Order laying out new highway.

2. The defendants' fourth ground of error is that "the proper and necessary parties are not before the court (1), be-

cause this proceeding is prosecuted in the name of the state's attorney alone, and the railroad company is not the party plaintiff, although the only party in interest; (2) because the town of Branford is not the party defendant, although the order is directed to the town, and not to the selectmen; and (3) because, since the institution of this action, one of the original defendants has ceased to be a selectman, and another has been elected in his place."

Proper and necessary parties.

The argument here is that the *mandamus* commands nothing but the laying out of a new highway, and that the laying out of a highway is not of public concern, but is a matter of private and adversary nature. Without intending to admit the correctness of this argument, we do not care to discuss it. It departs from the real question in the case. That question is not the laying out of a highway, but the removal of a grade crossing. If it be granted that the laying out of a highway as a separate affair, disconnected from anything else, is of an adversary or private nature, yet, where the construction of a short portion of new highway, by way of alteration of an existing one, is the necessary incident to the removal of a grade crossing, then it becomes a public matter. It ceases then to be of a private and advisory nature, and rises to a question of public concern, in respect to which the state's attorney should properly act.

The protection of human life is of the highest public concern, and the removal of grade crossings tends directly to the protection of life. The acts of the legislature are the exercise of the governmental power and duty to secure safe highways. It is stated in High on Extraordinary Remedies, § 431, that "when the question is one of public right, and the object of the *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted need not show that he has any special interest in the result, it being sufficient that he is a citizen, and, as such, interested in the execution of the laws." The cases cited show that this is the rule when a private citizen on his own account, and without the intervention of any public officer, moves for a writ of *mandamus*. On the other hand, some cases hold that in matters of public concern it is for the public officer exclusively to apply for the writ. Mos. Mand. 195; Rex. *v.* Merchant Tailors' Co., 2 Barn. & Adol. 115; Sanger *v.* Com. of Kennebec, 25 Me. 291; People *v.* Tracy, 1 Den. (N. Y.) 617; Wellington *v.* Petitioners, 16 Pick. (Mass.)105; People *v.* Regents of University, 4 Mich. 98;

People *v.* Inspectors of State Prison, *Id.* 187; Linden *v.* Board of Supervisors, 45 Cal. 6; Heffner *v.* Com., 28 Pa. St. 108. While the practice in this state has not been uniform, it certainly permits the state's attorney to prosecute in his own name alone. 1 Swift, Dig. 578; State *v.* Hartford & N. H. R. Co., 29 Conn. 539; State *v.* Fyler, 48 Conn. 145.

To whom writ should be directed.

The writ must be directed to those, and those only, who are to obey it. This is necessary, so that, in case the command is disobeyed, it may be certain who is to be proceeded against for the contempt; and a disregard of this rule is a sufficient ground for sustaining a motion to quash. High, Extr. Rem. § 542. If the act commanded is to be done by a select body, then the writ should be directed to the select body. Ang. & A. Corp. § 718. And where proceedings by *mandamus* against municipal officers to compel the performance of their official duties have been begun, a change in the membership of the office does not so change the parties as to abate the proceedings. Dill. Mun. Corp. (4th Ed.) § 874, note 3. So, too, where a *mandamus* has been brought against a municipal officer in his official capacity, upon whom service of process has been made, it may be continued against his successor without compelling the party aggrieved to begin *de novo*. *Id.* (4th Ed.) § 184; High, Extr. Rem. 443; Mos. Mand. 200; Maddox *v.* Graham, 2 Metc. (Ky.) 56; Lindsey *v.* Auditor, 3 Bush, (Ky.) 231; City of Louisville *v.* Kean, 18 B. Mon. (Ky.) 9, 13; State *v.* Common Council of Madison, 15 Wis. 33; People *v.* Supervisors of Barnett Township, 100 Ill. 332; Pegram *v.* Comm'rs. of Cleveland Co., 65 N. Car. 115. There is no defect in respect to the parties.

Decision of commission on question of "public safety." Review on appeal.

3. The first ground of error set forth in the appellant's brief is that "the change of grade made by the railroad company after the order will render its enforcement useless and ineffectual to accomplish the end designed." This ground of error assumes certain facts to be in the case which as facts are not in it. In their return to the alternative writ, the defendants, among other things, averred that after the order of the railroad commissioners was made the railroad company had raised the grade of its track three feet higher than it was at the time of the passing of the order, and "that public convenience and necessity do not require the construction of the highways in question so as to pass over the bridge as now constructed by the railroad company, and public convenience and necessity do require that the highways in question be carried under the railroad tracks constructed at the grade that it now is." The state's

attorney demurred to this part of the return, and the superior court sustained the demurrer. Counsel for the appellants, many times in their brief and in their oral argument, speak of the facts averred in this part of their return, as though they were facts in the case for all purposes, in the same way that they would be if they had been established by evidence and found by the court. They say it is "admitted by the demurrer," "conclusively admitted," etc., with various repetitions, that public convenience and necessity do not require the lay-out of the pieces of new highway ordered by the commissioners. This is a use of the facts alleged in a pleading to which a demurrer has been interposed, entirely unwarranted by law. "A demurrer neither asserts nor denies any matter of fact, but merely advances a legal proposition, namely, that the pleading demurred to is insufficient in the law." Gould, Pl. chap. 9, § 2. A demurrer admits facts that are well pleaded, in that it does not deny them; yet the admissions can be used only for the purposes of the argument on the demurrer. It is not evidence for the party alleging the facts demurred to. 1 Chit. Pl. 662; Pease *v.* Phelps, 10 Conn. 62; Crogan *v.* Schiele, 53 Conn. 208, 673. And when a demurrer is sustained, the facts alleged in the pleading demurred to are not in the case. The statute says that the railroad commissioners, when in their opinion public safety requires an alteration in a highway, may order it, etc. The return speaks of "public convenience and necessity." If this expression, "public convenience and necessity," means something different from "public safety," then the demurrer was properly sustained, because the return was not responsive to the writ, and did not show any excuse for disobeying it. If, on the other hand, the words "public convenience and necessity" in the return mean the same thing as the words "public safety" in the statute, we think the demurrer was correctly sustained for another reason. Whether or not public safety requires any change of a highway at a grade crossing, to the end that such crossing may be removed, is a question that the legislature has intrusted solely to the railroad commissioners as an original one, and to the superior court only by an appeal from their doings. The superior court, on the hearing of the *mandamus*, had no authority to pass upon that question. No appeal having been taken from the decision of the commissioners, that question was *res adjudicata*. The effort to retry it by the return was clearly irregular. But, if everything be granted that the appellants urge, their conclusion would not follow. The *mandamus* would not become fruitless. The grade crossing would still be removed, only in a little less convenient manner.

4. The third ground of error is that "the order and the alternative and peremptory writ are each indefinite and uncertain," without the map referred to therein. We assent to everything said in the argument to the effect that any order which is to be enforced by a *mandamus* should be clear and certain, so that the respondent may know the precise thing he is to do. Obviously no greater certainty can be required in the alternative or peremptory writ than in the order itself. The order of the railroad commissioners was in the nature of a judgment, in respect to which the *mandamus* is an execution. *Mandamus* is final process. If it was not the duty of the defendants to lay out the designated portions of highway by reason of that order, it was not made such by reason of anything contained in the alternative writ. Here again the objection stated is not the one argued. The real objection under this head is, not that the order is uncertain, but that it was not sufficiently published to the defendants. It is not claimed that the order as it exists in the office of the railroad commissioners is indefinite or uncertain. But the defendants insist that they are under no duty to obey that order until a copy of it with the map was served upon or left with them; that they were under no obligation to take notice of anything on file or recorded in the office of the railroad commissioners. The fallacy of this claim can best be illustrated by an example. Take the common case of a highway laid out by a committee of the superior court. A report laying out the highway, containing a survey, and often accompanied by a map, is made to the court, and is incorporated into a decree, and recorded, and left on file in the office of the clerk of the court. No copy is required to be furnished to the town or the selectmen. They would be bound to take notice of the contents of such report, of the survey therein, and any map that might be attached thereto. Putting the report on file is, in the eye of the law, a personal communication of its contents to the town and its selectmen. If they neglected to build the highway so laid out, or to open it for public travel within the time fixed in such decree, there can be no doubt but what it could be enforced by *mandamus*. And it is certain that the writ would be directed to the selectmen; and it is equally certain that the selectmen would not be heard to say that they did not know the thing ordered in the committee's report. Having been parties to the proceedings, they would be presumed to know what the report contained. If they were ignorant, it would be from their own neglect. Now, the actual case in hand is almost exactly like the one supposed. The town of Bran-

Sufficiency of order and writ.

ford and its selectmen were notified of the time and place of the hearing before the railroad commissioners. They were parties to the proceedings. They were present, and were heard. They were notified of the decision. They knew it was on file and recorded in the office of the railroad commissioners, an office no less public than the office of the county clerk, and where they could examine and obtain copies of a decision equally well. We think they were bound to take notice of the contents of that decision. As in the case supposed the selectmen would not be heard to allege their own ignorance, we see no good reason why they should be so heard in the actual one. The objection, if it should be made, that the alternative writ is defective because it refers to the map as on file in the office of the railroad commissioners, instead of having a copy attached, is one of form, of which advantage could be taken only by the motion to quash. Fuller *v.* Academic School, 6 Conn. 532.

5. The fifth ground of error is: *First.* That the application is not verified by an affidavit. In applications brought by a public officer for the enforcement of public rights an affidavit is not necessary. State *v.* Bridge Co., 3 Har. (Del.) 312. *Second.* That the superior court, after the appeal was perfected, issued the peremptory writ, and immediately recalled it. If this was an error, it was one of practice, and one which did the defendants no injury, and so cannot be noticed here. There is no error in the judgment appealed from. The other judges concurred.

Verification of application.

Abolishment of Grade Crossing—Apportionment of Expenses—Mandamus to Enforce Orders of Railroad Commission.—See Appeal of New York & New England R. Co., (Conn.), 45 Am. & Eng. R. Cas. 109, note 112; Appeal of Town of Fairfield, (Conn.), 39 *Id.* 689.

Jurisdiction of Railroad Commissioners to Regulate Crossing Over Track not Constructed for Public Use.—In Maine, railroad commissioners have no jurisdiction, under Rev. St. chap. 18, § 27, as amended by Maine Pub. Laws 1889, chap. 282, to regulate the crossing by a highway of a railroad track, not constructed for public use under charter authority. *In Re* Railroad Commissioners, 83 Me. 273.

Power of Railroad Commissioner to Order Overhead Crossing under Authority to "Prescribe the Details."—Under a statute authorizing the cities of Boston and Cambridge to construct a bridge and avenue across the Charles river, and providing that "the avenue may cross at grade any railroad operated by steam and the board of railroad commissioners shall upon the application of either city or any railroad corporation prescribe the details of the crossing," the cities have authority to lay out a crossing at grade and the city of Cambridge having laid out such a crossing, the railroad commissioners have no power to order an overhead crossing. City of Cambridge *v.* Board of Railroad Commissioners, 153 Mass. 161.

ALLEN

v.

MAYOR, ETC., OF JERSEY CITY.

(*New Jersey Supreme Court, July 16, 1891.*)

Location of Railroad—Power to Cross Streets.—The grant to a railroad company by its charter of power to lay out and construct a railroad between designated termini carries with it, as an incident of the grant, power to cross streets and highways within the location of its road, without any special grant to that effect.

Authority of Municipality to Regulate Use of Streets by Railroads.—A municipal corporation, within the limits of which a railroad company has located its road under legislative authority, may, under the power to regulate the use of streets, pass ordinances regulating the use of streets by railroad companies constructing and operating railroads within the city under legislative franchises, provided such regulations do not unreasonably interfere with the exercise of franchises conferred by the legislature.

Same—Interference with Corporate Franchise—Unreasonable Ordinance.—A city ordinance which prohibits digging up the surface of any street except by permission of the board of aldermen first had and obtained, as applied to a railroad company laying its track across a street within its located right of way, is not a reasonable regulation of the company's exercise of its corporate franchises. Such an ordinance in effect declares that a right conferred by the legislature shall not be exercised except by the consent of the city government, and in that respect the ordinance is illegal and void.

The plaintiff in *certiorari* was arrested and prosecuted before the first district police court of Jersey City, upon a complaint charging him with the violation of a city ordinance "by tearing up a portion of Jersey avenue, a public street in Jersey City, and placing or causing to be placed thereon a number of iron rails and a number of railroad ties, thus obstructing the free use of said street by the public." At the hearing before the justice the defendant filed a special plea of justification, as follows, viz: "The defendant, Paul Allen, comes and says that it is true that he did commit the acts charged against him in said complaint, but that he is not guilty of violating any ordinance, because he says that at the time, etc., charged he was a workman employed by the New York, Lake Erie and Western Railroad Company, who is the lawful lessee of the railroad and franchises of the Long Dock Company, a corporation authorized to build a railroad extending from the eastern mouth of the Bergen tunnel to the Hudson river, sixty-six feet wide, with the right to widen the

same to one hundred feet. Said railroad, with such right of way, has existed since and before the year eighteen hundred and fifty, and said New York, Lake Erie and Western Railroad Company, and its predecessors, whose rights it has lawfully acquired, has operated and it does now operate the same. Said Long Dock Company owns, and its lessee has the right to occupy and does occupy, lands on each side of every street which said railroad crosses to the width of over two hundred feet. Said railroad in its progress to said river crosses several streets, and among them Jersey avenue, at grade, being so originally laid out and built; and said New York, Lake Erie & Western Railroad Company, having determined to lay down an additional track within its said right of way, the said Long Dock Company consenting thereto, crossing said streets, and among them said Jersey avenue, employed this defendant to aid in so doing, and the acts charged against him were done in the reasonable discharge of said employment. Said railroad crosses said streets, including Jersey avenue, at grade, which grade said defendant was instructed not to interfere with, nor so to lay down said track as to prevent or unnecessarily obstruct public travel, nor did he nor would he have done so; and defendant saith that the law does not require the permission of the board of aldermen of Jersey City before laying down the additional track within the right of way aforesaid, and he admits that no such permission has been obtained, and he prays to be hence discharged with costs." The justice, in his return, certified as follows: "The parties appeared, and defendant (by counsel) filed a plea, in which he admits committing the acts charged in the complaint aforesaid, but says that he is not guilty of violating any ordinance, for reasons set out at length in said plea. No evidence was taken, but from admissions of defendant in his plea judgment was rendered for the said mayor and aldermen in the sum of ten dollars."

Argued before DEPUE, VAN SYCKEL, and SCUDDER, JJ.

Cortlandt Parker, for plaintiff.

W. D. Edwards, for respondent.

DEPUE, J.—The facts set out in the defendant's plea are conceded, and the object of this litigation is to determine the validity and effect of the city ordinance as against the rights, powers, and privileges conferred by the legislature upon the railroad company under whose rights the defendant justified. By an act entitled "An Act to incorporate the Long Dock Company," approved February 26, 1856, (Pub. Laws 1856, p. 67,) certain

Statutory provisions.

individuals, owners of property in Jersey City known as the "Long Dock Property," were incorporated. The company was authorized to receive conveyances for the Long Dock property; to purchase and improve lands; to establish and maintain a ferry; and, for the purpose of improving property sold or purchased by them, to construct a lateral or branch railroad to intersect any railroad "authorized or constructed by law" within the limits of Jersey City or the city of Hudson, with the same powers and privileges as were conferred upon the New Jersey Railroad & Transportation Company for locating, constructing, and maintaining its railroad by the act incorporating the latter company and the supplements thereto, with a restriction that such railroad should not be laid along any street of Jersey City without the consent of the mayor and common council of the city, and that the company should provide such police and safeguard as the city government might require when the railroad crossed any street upon a level therewith. The New Jersey Railroad and Transportation Company, by its charter, passed March 7, 1832, was authorized to lay out and construct a railroad sixty-six feet in width, with as many sets of tracks as might be deemed necessary. Har. Comp. 376. The same powers were conferred on the Long Dock Company by its charter, *i. e.*, to lay out and construct a railroad sixty-six feet in width, and to place thereon as many sets of tracks as the company might deem to be necessary. The Paterson & Hudson River Railroad Company was incorporated January 21, 1831, with power to construct and operate a railroad from Paterson to the Hudson river. *Id.* 318. By sundry agreements, leases, and validating acts of the legislature, some of which are referred to by Mr. Justice BEDLE in his opinion in McGregor *v.* Erie R. Co., 35 N. J. Law, 89–95, the property, franchises, and privileges of the Long Dock Company and the Paterson and Hudson River Railroad Company became vested in the Erie Railway Company, now the New York, Lake Erie & Western Railroad Company. The railroad between the east end of Bergen tunnel and the Hudson river was built by the Long Dock Company, and, in connection with the railroad of the Paterson & Hudson River Company, forms a continuous line of railway from Paterson to the Hudson river; and, as was held by the court in McGregor *v.* Erie R. Co., *supra*, is operated under the charter of the latter company. The eleventh section of the act incorporating the Long Dock Company limited the continuance of the act to thirty years. By a certificate filed in the secretary of state's office on the 2d of January, 1877, the company extended its

corporate existence for an additional period of fifty years, pursuant to the act of April 21, 1876. Rev. Supp. 150. Before the period limited in its original charter had elapsed, the company obtained a right of way sixty-six feet wide, and built its railroad thereon. The act for which the defendant was prosecuted was done in laying an additional track within the said right of way, crossing Jersey avenue.

Power to cross streets.

The grant to the company of the power to lay and construct its railroad carried with it by implication authority to cross with its tracks streets within the location of its route, without any special grant to that effect. Attorney General *v.* Stevens, 1 N. J. Eq. 370; Pennsylvania R. Co. *v.* New York & L. B. R. Co., 23 N. J. Eq. 157; 2 Dill. Mun. Corp. § 560. The only restriction the charter of the Long Dock Company imposed with respect to streets was that the company should not lay its railroad along any street without the consent of the municipal authorities; and the only obligation was that at a street crossings on a level the company should provide police and safeguards such as the city government should require. The railroad crosses Jersey avenue at grade, and the case shows that the track was laid so as not to interfere with, prevent, or unnecessarily obstruct public travel. In laying its tracks across a street the company was in the exercise of the authority conferred by its charter.

Power of city to regulate use of streets.

By the charter of Jersey City power was conferred upon the board of aldermen to pass, alter, or repeal ordinances for certain enumerated purposes, among which is included power to declare what shall be nuisances in lots, streets, etc., and to provide for the removal thereof; to regulate and control the running of locomotive engines, etc., and railroad cars through the streets, etc.; to regulate the use of streets and public places by foot passengers, vehicles, railways, and engines; to regulate or prevent the use of streets for any other purpose than public travel; and to provide for the removal of any encroachment on streets or public places; and also to prescribe the penalties by a fine not exceeding $50, or by imprisonment not exceeding ten days, or both, for the violation of any ordinance. Pub. Laws 1871, pp. 1094–1107.

Provisions of ordinance.

The ordinance in question is entitled "An ordinance regulating the use of streets, sidewalks, and public grounds." The sixteenth section provides that "no person shall * * * put or place, or cause * * * to be * * * or placed into, upon, or within any public street * * * any * * * thing whatsoever, whereby the free and unobstructed use by the public

for lawful purposes of any and every portion of such street * * * may be in any wise impeded or interfered with, * * * or disturb or dig up, or cause to be disturbed or dug up, the surface of any public street * * * in such manner that public travel therein, or in any part thereof, may be obstructed or impeded, except by permission of the board of aldermen first had and obtained, under a penalty of not exceeding ten dollars for each offense." This section, for its sanction, is referable to the provisions of the charter conferring upon the board of aldermen power to regulate the use of streets, and to prevent their use for any other purpose than public travel.

Under the powers conferred by the city charter it was competent for the board of aldermen to pass ordinances regulating the use of streets by railroad companies constructing and operating railroads within the city under legislative franchises, provided such regulations do not unreasonably interfere with the exercise of franchises conferred by the legislature. State *v.* Mayor, etc., of Jersey City, 47 N. J. Law, 286, 26 Am. & Eng. R. Cas. 400; State *v.* Mayor, etc., of Hoboken, 41 N. J. Law, 71; Trenton Horse R. Co. *v.* Trenton, 53 N. J. Law, 132. Under the power to make reasonable regulations upon the subject, an ordinance providing for notice by the company to the street commissioner or other executive officer of its purpose to cross a street, that the work may be done under the supervision of a city official, or that public travel shall not be unnecessarily impeded, that the surface of the street should be restored, and the like, would be within the competency of the city government. But where the legislature, in the grant of franchises, has prescribed the rights and privileges of such a company, the city government cannot qualify or abridge the force of the legislative grant. As against such a grant of franchises, beyond reasonable regulation, the city government, as was said by Mr. Justice REED in the Trenton Case, is powerless to interfere. The Long Dock Company, under its charter, had power to have a right of way sixty-six feet wide, and to lay thereon as many tracks as it might deem necessary. The power to pass over streets crossing its located route was incident to the grant of the right to lay out and construct its railroads. The charter prescribed in what respects the company's rights should be subject to municipal control; that it should not lay its railroad longitudinally upon a street without the city's consent, and should protect grade crossings by police and safeguards such as the city might require. The ordinance had no relevancy to the rights re-

Ordinance interfered with legislative franchise.

served to the city in the company's charter, nor is it simply a regulation of the company's exercise of its franchises. As applied to the facts of this case the ordinance subjects the company's right to utilize its right of way under its charter to the will of the legislative department of the city government. The rights which the legislature granted to the company the ordinance in effect declared should not be exercised except by the consent of the board of aldermen. The ordinance, it is true, imposes merely a moderate fine, and the construction of the track was not otherwise interfered with than by arresting a workman, and imposing upon him the fine; but if the right of the city government to act in the premises is sustained, the construction of tracks, etc., on streets may be hindered by those delays which are incident to the proceedings of the legislative department of the city government, and terms may be imposed at the will of that body, or consent be refused; the execution of the work may be impeded, if not prevented, by the arrest of the company's workmen; and by a change in the ordinance penalties by fine and imprisonment may be imposed from time to time for the continuance of the track after it is laid, and the track itself be removed as an unlawful encroachment upon the public street, because the board of aldermen has not consented to its construction. As applied to the facts of this case, the defendant's justification was complete. The conviction was illegal and should be set aside.

Location of Railroad Within City—Power of City Council to Regulate Use and Crossings of Streets.—A railroad company, as a general rule, may select its own route, and, where the charter does not so provide, may fix the terminal points and lay out its road and acquire the right of way and other property necessary for the construction of its road on any and every part of the line, whether within city limits or without them, according to its own discretion. The lines thus selected may, without the assent of the city, cross streets; and the mere existence of a power in the city council "to provide for the location, grade, and crossings" of railroads within the city, and "to change the location, grade, and crossings" of railroads, until exercised, is no limitation upon the power of a railroad company to select its route, and locate its road within the city. Chicago & W. I. R. Co. *v.* Dunbar, 100 Ill. 110, 5 Am. & Eng. R. Cas. 253.

Road not Opened—Right of County to Grant Street Car Company Permission to Lay Tracks Across Railroad.—Where a county court declares a road to be open as soon as certain fences are set and other conditions complied with, and the proposed road is left with railroad tracks, fences, and embankments crossing it for eleven years thereafter, and there is no proof that any of the said conditions were ever fulfilled, the county authorities have no right to grant a street car company permission to lay its track along such road without the consent of the railroad company, and the laying of such track may be enjoined at suit of the railroad company. Cincinnati Southern R. Co. *v.* Chattanooga Electric Street R. Co. 44 Fed. Rep. 470.

What is Public Street Within Meaning of Crossing Law—Street not Yet

Opened.—A street laid out under a statute, which provides that streets laid out in accordance therewith, shall be deemed public, and to be thereafter opened, is, although not open to travel, a public street, within the meaning of a statute requiring railroad companies crossing public streets to so construct their road as not to impede the passage of persons or property along the same. City of Chester *v.* Baltimore & P. R. Co., 140 Pa. St. 275.

NEW YORK & NEW ENGLAND R. CO.

v.

COMSTOCK, *et al.*

(*Connecticut Supreme Court of Errors, March 4, 1891.*)

Farm Crossing—Right of Land Owner to—Right of Railroad to Close.—A railroad company has the right to the exclusive possession of the lands taken by it for the purpose of its right of way. Accordingly a land owner, through whose premises a railroad right of way has been condemned, cannot require that a farm crossing be kept open in order to facilitate his convenience, although it appears that the land on which the road was constructed had long been used for a farm road and that the railroad company had for several years kept open such crossing, which did not interfere with its use of the right of way.

Action to Restrain Land Owner from Using Crossing—Statute as to Closing Existing Crossings.—An action by a railroad company for an injunction to prevent an adjoining land owner from crossing its railroad track, is a suit to determine the legal right of the company to close an existing crossing within the meaning of a statute (Laws Conn., 1889, p. 81, § 2) providing that "no railroad company shall remove, obstruct or otherwise interfere with any such crossings until the legal right to do so" shall have been adjudicated; "and any railroad company claiming to be aggrieved by such crossing may bring suit against the person owning the land adjoining it" to determine such right.

APPEAL from Hartford Superior Court.

Action by New York & New England Railroad Company against William G. Comstock, Jr., and others, to restrain them from crossing the company's tracks. Decree for defendants and plaintiff appeals.

E. D. Robbins, for appellant.

L. Sperry and *J. A. Stoughton*, for appellees.

LOOMIS, J.—This is a complaint for an injunction to prevent the defendants from crossing the railroad track of the plaintiff. The following is a brief statement of the material facts contained in the finding: the land in question, now occupied by the plaintiff's railroad tracks, was formerly owned by William G. Comstock, the father of the defendants, who derived title by deed from him, and it formed part of one contiguous tract of land, 44 rods wide,

Facts.

and extending easterly from Main street in East Hartford about 200 rods. In 1875 the Connecticut Central Railroad Company took, by condemnation for railroad purposes, a strip of land, including that now in question, extending northerly and southerly through said entire tract, dividing it into two nearly equal parts, and leaving no access to that part lying east of the railroad, except by crossing the railroad; and when the tracks were laid on the strip of land so condemned the Connecticut Central Railroad Company constructed suitable crossings at two places where said William G. Comstock, Sr., had been accustomed to pass from one part of the tract to the other, and these crossings were maintained by the Connecticut Central Railroad Company as long as it continued to run and operate the road, and have since been maintained by the plaintiff corporation until August, 1888, and said William G. Comstock, Sr., while he continued owner of the tract was, and the defendants, since they acquired title have been, accustomed at all times when they had occasion for farm purposes to cross the railroad upon the two crossings mentioned until the date last referred to. In October, 1875, the Connecticut Central Railroad Company mortgaged its railroad, including this land, to secure certain bonds, and in 1887 the treasurer of the state foreclosed the mortgage and the title became absolute in him. In December, 1887, the state treasurer, by good and sufficient deed, conveyed all the right, title and interest that formerly belonged to the Connecticut Central Railroad Company in said railroad and in said land to the plaintiff corporation, which has ever since owned and operated the railroad over the land in question. In the year 1888 a new highway was laid out and opened for public travel, extending from Main street easterly along the south line of the defendants' land, which highway crosses the railroad in the immediate vicinity of the southerly crossing previously maintained by the railroad companies for the use of the defendants, but since that time it has not been used by these defendants. The other farm crossing near the center of the above tract of land remained, and was used by the defendants as before until a short time before the commencement of this suit, when the plaintiff took up the crossing, and erected a fence on the sides of its railroad tracks, to prevent the defendants from crossing. But the defendants insisted upon their right to use the crossing near the center of their land, and tore down the fence so erected by the plaintiff, and have since continued to use it as before. In the proceedings to condemn the land for railroad purposes no reference of any kind was made to the farm roads which William G. Comstock, Sr., had been

accustomed to use on the land, nor to any future use of the same. The court further finds that "no evidence was offered to prove that the use of said farm crossing [referring to the central one] as it had been heretofore used by the defendants was unreasonable or inconsistent with the plaintiff's use of said strip of land as it has been accustomed to operate its railroad, or that the use of the farm crossing by the defendants will in the future interfere in any way with the use of the same land by the plaintiff corporation for railroad purposes."

The general question arising upon these facts is whether the defendants have a right to have the crossing in question kept open and maintained for their use? Upon what foundation can any such right rest in this case? The defendants do not claim to have gained a right to cross by adverse user, for the time is inadequate to confer such a right. Neither do they claim a right of way of necessity, for in 1888 a highway was laid out and opened for public use along the south line of the land in question; and it is obvious that any point on the entire tract may be reached from this highway without crossing the railroad at all, and the most remote point is distant only 44 rods. The argument in behalf of the defendants, although stated in different forms, seems to be based principally upon the assumption that, when land is taken under the power of eminent domain for railroad purposes, no exclusive right to the possession and control is thereby vested in the railroad company, but that there is left in the original land owner not only the fee subject to the easement, but also a right to use the same land in any manner not inconsistent with the railroad purposes for which the land was condemned, and that the question whether the land owners' proposed use is inconsistent or not with the use for which the land was condemned is a question of fact to be determined by the evidence in the particular case. The special finding in case at bar, that no evidence was offered to show such inconsistent use, renders it probable that the trial judge may have accepted this idea as the basis of his judgment for the defendants.

Defendants' right to have crossing kept open.

The defendants cite Imlay *v.* Union Branch R. Co., 26 Conn. 255, as supporting their contention. It does not seem to us to furnish such support. The question in that case was whether the location of a railroad upon a public highway amounted to the imposition of a new servitude, in addition to and distinct from the other, so that the owner in fee was entitled to compensation therefor. The able discussion of the question by STORRS, C. J., was directed solely to the

point that a taking of land for railroad purposes was a very different thing from a taking for highway purposes, and the conclusion reached was that on that account the land owner was entitled to compensation. In the argument for the defendants in that case, as in this, the rights retained by the land owner after condemnation of his land for railroad purposes were illustrated by reference to the rights of an adjoining owner in the highway. The opinion in that case shows that such an argument must be misleading. But it may be suggested that the object of citing that case was to show the principle there laid down and applied, namely, "that when land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby convertible into a common; as the property is not taken, but the use only, the right of the public is limited to the use—the specific use—for which this proprietor has been deprived of a complete dominion over his own estate."

We have no fault to find with the principle here laid down, but the question recurs, what are the purposes for which land is condemned by a railroad company, as in this case? To us it seems obvious that there is little analogy between the case of a highway and a railroad; but in most respects there is contrast, rather than analogy, for in the case of a highway the use is general, and open to all, including the adjourning land owner as part of the public, but the public have no exclusive right to occupy any particular part, or put any permanent structure upon the way. It is taken simply for public travel over it, while, on the other hand, a taking for railroad purposes is necessarily peculiar, permanent and exclusive. This scarcely needs other demonstration than that addressed to the eye from the mere appearance of a railroad, with its level grade, often far above or below the general surface of the adjoining ground, with its iron rails firmly laid above and upon the projecting crossties adapted solely to one special mode of conveyance, to vehicles of immense weight, speed, and momentum, and to agencies for locomotion of the most hazardous kind. Our statutes, that require all railroad companies (under certain qualifications) to build continuous fences on both sides of their roads, imply that their possession is exclusive, and that adjourning land-owners have no greater rights than others; for, if the law is as claimed, then the right of the land-owner to make entry on the track would not be confined to regular places, but he might cross anywhere along the line of his land, and might travel lengthwise as well as crosswise, unless, indeed, the court should first determine

as matter of fact, that the proposed use would interfere with the operation of the railroad.

It cannot be that the question is one of fact. If so, there would be no rule at all that could be relied upon. It would vary as often as a case arose with the adjoining owner. In view of the responsibility of railroad companies for safely carrying persons and property, and the great hazard to human life and property from obstructions on the track, the power to exclude every one from the railroad limits must be left, as matter of law, absolutely with the officers of the company, who are immediately responsible, subject only to such state supervision as may be deemed expedient; and such is the established doctrine, as declared by a general *concensus* of legal authority. REDFIELD, C. J., says, in giving the opinion of the court in Jackson *v.* Rutland & B. R. Co., 25 Vt. 159: "The right of a railway company to the exclusive possession of the lands taken for the purposes of their road differs very essentially from that of the public in the land taken for a common highway. The railway company must, from the very nature of their operations, in order to the security of their passengers and workmen and the enjoyment of their road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose. It is obvious that the right of the railway to the exclusive occupancy must be for all the purposes of the roads much the same as that of an owner in fee." The supreme court of Massachusetts says: "The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature, and practically exclusive." Hazen *v.* Boston & M. R. Co., 2 Gray (Mass.) 580. The supreme court of Vermont says: "Those who control, manage, and operate the railroads in the country should have the full and exclusive possession and control of the land taken for the legitimate use of the road within the lines thereof, and embraced within the fences that by the laws of this state the railroads are required to keep upon the sides of their road. Although the right of the railroad company is but an easement, and not a fee, this does not preclude their having the sole and exclusive possession of the land while in the exercise of that easement. The fact that upon the abandonment and surrender of their road and charter the land would revert to the former owner does not curtail their right to its exclusive use if necessary. * * * Everything that tends to increase the danger of travel upon our railroads public policy requires should be prevented if practicable. * * * The railroad

companies are always liable to suffer severely in their property in cases of accident. They are also, to a certain extent, liable to others for injuries resulting from such causes, and to this liability they should be strictly held. At the same time we think they should have such sole and exclusive control of the land within the lines of their road as shall enable them so to keep it as to exclude all probability of any accidents resulting from any outside interference with such possession." Troy & B. R. Co. *v.* Potter 42 Vt. 274. The supreme court of Massachusetts says, speaking of the rights of a railroad company, to the land condemned by it for railroad purposes: "The mode of occupation and the degree of exclusiveness necessary or proper for the convenient exercise of its franchise are within the absolute discretion of the managers of the corporate functions. They are the sole judges of what is proper or convenient as means for attaining the end and performing the service for which the corporate franchises were granted." Proprietors of Locks & Canals *v.* Nashua & L. R. Co., 104 Mass. 9. In further confirmation of our position we also refer to Hayden *v.* Skillings, 78 Me. 413, 29 Am. & Eng. R. Cas. 316; Connecticut & P. R. R. Co. *v.* Holton, 32 Vt. 43; Boston Gas Light Co. *v.* Old Colony & N. R. Co., 14 Allen, (Mass.,) 444; Presbrey *v.* Old Colony & N. R. Co., 103 Mass, 1; Brainard *v.* Clapp, 10 Cush. (Mass.) 6; Fayetteville & L. R. R. Co. *v.* Combs, 51 Ark. 324, 328, 39 Am. & Eng. R. Cas. 140; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259; Burnett *v.* Nashville & C. R. Co., 4 Sneed, (Tenn.) 528; Mills, Em. Dom. § 208; Pierce, R. R. 156, 160; 3 Wood, Ry. Law 1544.

Suggestion that right of crossing was never condemned.

The suggestion that the right of crossing was never condemned by the railroad company because the farm roads previously existed at the same place, and had long been in use by the owner of the land, hardly requires a separate answer. Mr. Comstock was the sole and absolute owner in fee, and in possession of one, and only one entire estate. There was no easement, no dominant and no servient estate; and the taking without exception or qualification necessarily took the whole for railroad purposes. The fact that the land had long been used for a farm road has no more materiality than would the fact that a special crop had always been cultivated upon it. Neither is there any legal significance in the fact that the railroad company had for several years kept open the crossings under the circumstances mentioned in the finding.

Only one other matter remains which it is important to

consider, and that is the effect upon this action of a statute passed in 1889, and found on pages 81 and 167 of the Session Laws of that year. It is entitled "An act to prevent arbitrary removal of farm crossings by railroad companies." The second section, which is all that needs to be considered in the present suit, is as follows: "No railroad company shall remove, obstruct, or otherwise interfere with any such crossing, until the legal right so to do shall have been finally settled by a judgment or decree of the superior court in the county where such crossing is located; and any railroad company claiming to be aggrieved by such crossing may bring its complaint against the person or persons owning the land adjoining such crossing, to said superior court, which court shall hear and determine the rights of the parties, subject to the right of appeal as in other civil actions. Any railroad company which shall violate the provisions of this section shall forfeit for every such violation the sum of one hundred dollars, which may be recovered in an action upon this statute by any person aggrieved thereby."

Effect of statute to prevent removal of farm crossings.

It seems manifest that one principal object of this section of the statute was to compel railroad companies, in all cases to which it is applicable, to bring a suit, and appeal to the courts to settle such controversies, instead of arbitrarily taking the remedy into their own hands, and asserting their rights by brute force. The plaintiff, then, having brought a proper suit before the tribunal named in the statute, surely cannot be turned out by the same statute that requires it to come into court. Any objection, therefore, founded upon this statute renders it indispensable to show that the present suit is not such a one as the statute contemplated. And here the only possible question that can be raised is whether the statute is exclusive as to the form of remedy, and requires an action at law instead of a proceeding in equity. But what foundation is there for such construction? The statute is silent as to the form of remedy. It simply uses the term "complaint," which is just as applicable to equity as to law. Section 28 of the practice act in terms provided that the word "complaint" should be substituted not only for "declaration," but also for "petition," or "bill in equity." There is nothing, then, in the prescribed mode of coming into court that would exclude the present proceedings. Is there any clue in the action required on the part of the court upon the complaint? The statute characterizes the action on the part of the court as a judgment or decree. The word "decree" applies peculiarly to the final determination of a court of equity, as distinguished from that of a

court of law. This alone would seem to justify us in construing the statute as referring to complaints in equity as well as at law. But it may be suggested that the statute also speaks of settling a legal right; but this is not inconsistent with the view we have taken, for a legal right may be settled by a decree in equity. Where, as in the case at bar, the jurisdiction of a court of equity is invoked in aid of a legal right upon the ground of averting irreparable injury, the court first determines the legal right, and, if that is free from doubt, and the exigency requires it, the court will at once intervene, and protect the right by decree of perpetual injunction. Although a complaint in trespass was open to the plaintiff, yet the injury was liable to prove a recurring one, and to be attended with great loss of property and of life, so that the use of a preventive remedy by injunction was eminently proper. As the finding fails to give the particular date when the railroad company obstructed the crossing by the erection of a fence, it may be well to state that no claim was made that it was after the passage of the act last referred to, and it will be seen that the defendant's answer to the amended complaint gives the date as August 14, 1888, so that there is no foundation for any claim that the railroad company violated the statute by first asserting its rights in the manner indicated. There was error in the judgment complained of, and it is reversed. The other judges concurred.

Land Owner's Right of Communication Across Railroad—Duty to Establish Farm Crossings.—In a recent case, decided by the supreme court of Canada, it was said to be "preposterous" to conceive it to be competent for the government to divide a man's property by a railroad, and, leaving him the several parts, to deprive him of all right to a crossing over or under the railway, from one part to another, suitable to the full enjoyment of his farm as severed into parts by the railroad, or having once provided a necessary crossing to deprive the land of the benefit of such crossing. Vezina *v.* The Queen, 17 Can. Supreme Ct. 1, 44 Am. & Eng. R. Cas. 73. See also Canada Southern R. Co. *v.* Clouse, 13 Can. Supreme Ct. 157, 35 Am. & Eng. R. Cas. 296. However, in this country, it is conceived that it is the law that unless it is made obligatory by statute, a railroad company is not under any obligation to provide or construct farm crossings for the benefit of land owners, whose property is intersected by the railroad. In nearly all the states it is required by statute that farm crossings shall be made in proper cases, and in some of them cattle guards must be placed at such crossings; and where this is required the duty exists whether the land was obtained by purchase or condemnation. Clark *v.* Rochester, L. & N. R. Co., 18 Barb. (N. Y.) 350. And see generally upon this subject, Omaha & R. V. R. Co. *v.* Severin (Neb.), 45 Am. & Eng. R. Cas. 122, note 136; People *v.* Detroit G. H. & M. R Co. (Mich.), 42 *Id.* 257; and cases cited in note 44 *Id.* 92.

When Farm Crossing is Necessary Within Meaning of Statute.—In Dubbs *v.* Philadelphia & R. R. Co. (Pa. March 28, 1892), 23 Atl. Rep. 883, it was

held that the fact that a farmer, whose land is intersected by a railroad, cannot pass over one part of his farm to another without either crossing the railroad or going half a mile out of his way, makes the construction of a crossing necessary within the meaning of a statute (Code Pa. Feb. 19, 1849), making it the duty of all railroad companies, "for the accommodation of all persons owning or possessing land through which the railroad may pass, * * * to make or cause to be made a good and sufficient causeway or causeways, whenever the same may be necessary to enable the occupant or occupants of the said land to cross or pass over the same with wagons, carts, and implements of husbandry, as occasion may require."

Right of Owner of Land on One Side Only to Have Farm Crossing.—The New York Code of 1850, chap. 140, § 44, provides: "Every corporation formed under this act shall erect and maintain fences on the sides of their road of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm crossings of the road, for the use of the proprietors of lands adjoining such railroad." *Held*, that the owner of land adjoining the road on but one side has a right to a crossing such as may be necessary for him to reach his property. Buffalo Stone & Cement Co. *v.* Delaware, L. & W. R. Co. (N. Y., Dec. 1, 1891), 29 N. E. Rep. 121. The court said: "Take the case of a farm abutting on a public highway, as this one did, and the corporation, instead of acquiring its right of way some little distance from the street, takes one alongside of the highway, so that one of the exterior lines of the land taken coincides with one of the boundary lines of the farm. In such a case the land is not divided, but the land not taken is as effectually cut off as though land remained on both sides of the road. Again—which is this case—two parallel and contiguous railroads are built at different times through a farm. The owner has a right to a crossing over the first road which is constructed, but when the second railroad is built it is argued that the owner has no right to compel that corporation to construct a crossing. The statute is not capable of any such narrow construction, its design being to compel such corporations to construct and maintain such crossings over their lines as are necessary to enable owners having land abutting on either or both sides of the road to reach and work their properties."

Farm Crossing Not Limited to Agricultural Purposes.—The New York statute (Laws 1850, chap. 140, § 44) providing that railroad companies must maintain farm crossings is not to be limited to crossings solely for agricultural purposes, but is deemed to include crossings to remove the natural products of the land, such as stone, minerals, etc. Buffalo Stone & Cement Co. *v.* Delaware, L. & W. R. Co. (N. Y., Dec. 1, 1891), 29 N. E. Rep. 121.

Right of County Commissioners to Order Private Crossings—Massachusetts Statute.—Since the Mass. St. of 1874, chap. 372, § 81 (Pub. Sts., chap. 112, § 113), a structure, by which the land owner whose lands have been appropriated by a railroad company, may conveniently cross the tracks at the same grade, or over or under the same, may be ordered, if the county commissioners judge it reasonable for his security and benefit. Boston & Providence R. Corp. *v.* Doherty, 154 Mass. 314.

Duty of Lessee of Railroad to Maintain Farm Crossing.—Where a railway company organized under the laws of the state leases its property to a foreign company, and by a covenant in that lease the latter expressly agrees to perform all things in connection with the road which the lessor might be required by law to perform, the lessee must maintain farm crossings, as required by Laws 1850, chap. 140, § 44. Buffalo Stone & Cement Co. *v.* Delaware, L. & W. R. Co. (N. Y., Dec. 1, 1891), 29 N. E. Rep. 121.

Extinguishment of Crossing by Railroad—Permission of Land Owner—Evidence.—On the issue whether a right of way across the plaintiff's railroad tracks enjoyed by the defendant had been extinguished by his license to the plaintiff to close up the way conditioned upon another suitable way being furnished to the defendant, which condition the plaintiff had performed, the plaintiff, against the defendant's objection, offered evidence that, on account of the great increase of the plaintiff's business the condition of affairs had become such that it was not safe for the operation of the road to continue such way; and that additional accommodations, which, if built on the plaintiff's land, would necessarily extend across and close up the way, were absolutely necessary for the accommodation of the traveling public. *Held*, that the evidence was properly admitted. Boston & Providence R. Corp. *v.* Doherty, 154 Mass. 314.

STATE *ex rel.* GRADY.

v.

CHICAGO, MADISON & NORTHERN R. CO.

(79 Wisconsin 259.)

Farm Crossings—Mandamus to Compel Construction—Effect of Statute Imposing Penalty.—Where a statute makes it the absolute duty of a railroad company to construct farm crossings, a railroad company can be compelled by *mandamus* to comply with this duty, unless it can show a valid excuse for not doing so. The fact that the statute imposes a penalty upon the company for neglecting to make proper crossings, and gives the occupants of a farm the right to recover the same, does not deprive them of the remedy by *mandamus*.

Direction of Writ of Mandamus to Railroad Company in Corporate Name.—In a proceeding by *mandamus* against a railroad company, it is proper to direct a writ to the company in its corporate name.

APPEAL from Green Circuit Court.

B. Dunwiddie, for appellant.

P. J. Clawson and *B. J. Stevens*, for respondent.

Case stated.

COLE, C. J.—The relator is the owner of a farm across which the defendant company has constructed its railway track, dividing the farm into two separate parcels. The company has been operating its road, running daily trains of cars over the same, for more than a year, but has neglected to construct suitable farm crossings for the convenience of the relator in passing with his teams and stock from one part of his premises to the other; and this application is for a *mandamus* to compel the company to construct proper crossings. On motion, the alternative writ was quashed, and the appeal is from the order quashing the writ. In support of the decision of the circuit court, it is argued that the petition does not state facts show-

ing that the relator is entitled to the relief demanded; in other words, that it fails to show that it is the duty of the company to construct such farm crossings. This is a mistake as to the duty which the statute imposes on the company. Chapter 193, Laws 1881, which amends section 1810 of the Revised Statutes, provides, in effect, that every railroad corporation operating any railroad shall erect fences on both sides of its road of the height prescribed, with openings or gaps or bars therein, and suitable and convenient farm crossings of the road for the use of the occupant of the lands adjoining.

Thus, it will be seen, the statute imposes a distinct and absolute legal duty upon the company to construct these farm crossings. The language of the statute is clear and specific, and cannot be made plainer by illustration or argument. It is imperative or mandatory, requiring the corporation to perform its legal duty. It is said it appears from the petition that there is a public highway which runs along on the east side of the relator's farm, and connects the two portions thereof, and that where the railway crosses this highway a bridge has been built over a deep cut, which, it is claimed, answers every purpose of a farm crossing. We can make no such an inference from the matters stated in the petition, nor hold that the bridge meets the requirements of the statute, and relieves the company from the duty of constructing any other farm crossing. It is possible that the company can show by evidence that this bridge on the highway fully answers the end and object of the statute, but we cannot presume that it does. On the contrary, as the statute in absolute terms, makes it the duty of the company to construct farm crossings for the use of the occupants of the adjoining lands, the company is under obligation to show some valid excuse for neglecting to perform its duty. We therefore hold, as the duty of the company was absolute and clear to make the proper farm crossings, unless there is some other objection to granting the writ, it was error to quash it on the facts stated.

Mandamus to compel construction of crossing.

Again, it is said the court always refuses to grant a writ of *mandamus* where the party has another adequate legal remedy. But has the relator such a remedy? Section 1813 provides, where a railroad corporation neglects to construct farm crossings proper for the use of the lands over which its road is operated, the owner or occupant may give the corporation written notice to construct such necessary farm crossings, and if the company, after being so notified, neglects for three months to construct

Effect of enforcing penalty.

the crossings, it shall be liable to pay the owner or occupant $10 for each and every locomotive that may thereafter pass through the lands until the farm crossing is made. This provision enables the owner to sue the corporation and recover damages or penalties for its failure to perform its legal duty; but that will not secure the construction of the necessary farm crossing, nor will it afford an adequate remedy. The writ of *mandamus* would seem to be the most efficient, if not the only adequate, means for compelling the corporation to do its legal duty. It is true, in Town of Jamestown *v.* Chicago, B. & N. R. Co., 69 Wis. 648, 32 Am. & Eng. R. Cas. 263, and City of Oshkosh *v.* Milwaukee & L. W. R. Co., 74 Wis. 534, 39 Am. & Eng. R. Cas. 681, a bill in equity for a mandatory injunction was sustained to compel a corporation to restore a highway or street to its former condition of usefulness. Perhaps that remedy might have been resorted to in the present case, but, though a party may have redress in equity, that of itself is not a conclusive objection to granting the writ of *mandamus*. It may possibly, and would, influence the court in the exercise of the discretion which it possesses in granting the writ under the facts and circumstances of the particular case, but does not affect its right or jurisdiction. Nor does the fact that the party is liable to indictment and punishment for his omission to do the act to compel the performance of which the writ is sought constitute any objection to granting the writ. People *v.* Mayor, etc., of N.Y., 10 Wend. (N. Y.) 593; Shortt, Inform. Prohib. & Mand. 235. It seems to us clear that *mandamus* is the only legal remedy to which the relator can resort in this case to enforce his rights to compel the corporation to perform the duty which the law imposes. The fact that the company is liable to pay $10 for each and every locomotive which passes over the land while it neglects, after notice for three months, to construct the proper farm crossing, constitutes no reason for denying the right. That does not take away the remedy, and does not profess to be exclusive of other means of redress.

The learned counsel for the company says, to entitle a person to the writ two things must concur: (1) A clear right to have the act done to compel the doing of which the writ is sought; and (2) that there is no other adequate legal remedy by which the performance of the specific duty can be enforced; and that the discharge of the duty is not discretionary. These conditions concur in the present case. The relator certainly has a clear legal right to have the farm crossings constructed for his use in cultivating the farm, and there is no other adequate legal remedy to compel the company to

do that act. If it shall appear on the hearing of the answer of the corporation that the making of the farm crossing is unnecessary because of the existence of a highway on the east side of the farm and the bridge over the cut furnishing all needful facilities for passing from one part of the premises to the other, or that the construction of a farm crossing would be impracticable on account of the situation of the land, these facts can be made to appear on the hearing. But, upon the matters set forth in the petition, nothing is shown which excuses the company from performing its statutory duty.

The writ is directed to the corporation in its corporate name, and it is insisted that it is misdirected; but we are inclined to hold the direction good. Of course, the corporation must act through its officers and agents, but whose duty it is to see to the construction of farm crossings may not be known. We hold the direction is sufficient. It follows from these views that the order of the circuit court quashing the writ must be reversed, and the cause be remanded for further proceedings according to law.

Direction of writ in corporate name.

Farm Crossing—Action to Compel Construction—Objection to Remedy.—In an action against a railroad company to compel the construction of a farm crossing, an objection that *mandamus* is the appropriate remedy, when not taken by the answer or on the trial, will not be considered on appeal. Buffalo Stone & Cement Co. *v.* Delaware, L. & W. R. Co. (N. Y., Dec. 1, 1891), 29 N. E. Rep. 121.

NEW YORK & NEW ENGLAND R. CO.

v.

CITY OF WATERBURY.

(Connecticut Supreme Court of Errors, January 5, 1891.)

Laying out Highway Across Railroad—Damages—Expense of Crossing.—Where the charter of a railroad company may be altered at the pleasure of the legislature, such company, across whose track a highway is laid out, is not entitled to have taken into account, in the estimation of its damages, the expense of bridging the highway, one half of which is by statute imposed upon the company, the other half to be paid by the town, city or borough constructing the highway. Compensation for expenses arising through such statutory imposition is not a legal element of damages.

CASE reserved from New Haven Superior Court.

Application by the New York & New England Railroad Company for a reassessment of damages for the taking of land for a highway by the city of Waterbury.

E. D. Robbins, for plaintiff.
G. E. Terry, for defendant.

Case stated.

SEYMOUR, J.—The legislature in the year 1883 passed an act "concerning the crossing of railroads by highways." It provided in one of its sections that "whenever a new highway or a new portion of a highway should thereafter be constructed across a railroad, such highway or portion of highway shall pass over or under the railroad, as the railroad commissioners shall direct. The company or trustee operating such railroad shall construct such crossing to the approval of the railroad commissioners, and may take land for the purposes of this section, in the manner now provided by law for the taking of land by railroad companies. One-half the expense of such crossing shall be borne by the company or trustee constructing the same, and the other half thereof shall be paid to said company or trustee by the town, city or borough which constructs said highway or portion of highway." Gen. St. § 3481. After the passage of this act the board of road commissioners of the City of Waterbury, upon due notice to and after hearing all owners of land proposed to be taken thereby, laid out a highway in said city, called "Fifth Street" which lay-out crosses the track of the applicant, and includes and takes therefor land in which it has the estate in fee. By direction of the railroad commissioners the highway was made to pass under the railroad. The railroad company constructed the crossing to the approval of said commissioners at an expense of $7,755.19. One-half of this sum has been paid by the city, but the railroad company has demanded the other half, and claims to be entitled thereto. On July 11, 1887, the board of compensation of Waterbury assessed and determined that the city pay to the railroad company, in full of all damages over and above all benefits accruing to the applicant from the said lay-out and extension of Fifth street, the sum of $198, and made its report accordingly to the court of common council of the city. The report was accepted and duly recorded, and said assessment of benefits and damages was confirmed and adopted by the court of common council, and approved by the mayor of the city. Thereupon the railroad company brought its application in due form for a reassessment of damages. The superior court finds that if said one-half of the cost of conveying the railroad over the highway which has not been paid to the railroad company by the city is to be taken into account and allowed in estimating the damage to which the company is entitled, the damages are $4,027.59; otherwise, the damages are $250. The question

what judgment shall be rendered upon the facts of the case is reserved for the advice of this court.

The contention of the railroad company is that it is entitled to claim and receive as part of its damages for the taking of its land for the highway, compensation for the entire expense which it was compelled to incur in constructing the crossing as directed by the railroad commissioners. It insists that the statute dividing the expense is not applicable to this case, and that to apply it and enforce it would be in violation of the provision of our constitution that the property of no person shall be taken for public use without just compensation therefor.

Contention of company.

The statute was passed, as is well known, as part of a general plan to diminish the number of grade crossings. Of course the legislature did not contemplate, when it provided that one-half the expense of constructing crossings under its provisions should be borne by the railroad company, that it in turn could recover such half from the town, city or borough constructing the highway, under a claim for damages consequent upon the exercise of the right of eminent domain in taking land of the railroad for highway purposes. The applicant nevertheless claims that the entire expense of constructing the crossing is damage incident to the taking of its land by the condemnation proceedings, to which it is entitled as just compensation. It argues that, inasmuch as the law compels it to build the bridge and pay one-half of the expense of so building, therefore Waterbury must pay such one-half of the expense, in addition to its own share, as just compensation for taking the land. The charter of the New York & New England Railroad Company is not what is called a "close charter," but is subject to legislative amendment. All general laws and mere matters of police regulation affecting corporations are binding without their assent. New Haven & D. Co. *v.* Chapman, 38 Conn. 71. The act in question has the effect of an alteration of the charter of a company, previously incorporated by a charter which did not impose the duty, but which contained a provision that it might be altered at the pleasure of the legislature. Bulkley *v.* New York & N. H. R. Co., 27 Conn. 479. It was held in English *v.* Northampton Co., 32 Conn. 240, that, under the power to amend a charter, the general assembly had a right to impose upon the defendant any additional condition or burden connected with the grant which they might justly have imposed originally. In that case the defendant's charter empowered it to construct and use a railroad terminating in the city of New Haven, and provided that the construction and use

Expense of crossing not an element of damages.

of that part of the road within the limits of the city should be subject to such regulations as the common council should prescribe. After the defendant had constructed its road and built bridges over the same within the city and to its acceptance, the legislature passed an act authorizing the common council to order the bridges widened in such manner as public convenience might require, and to enforce the order. It was contended by the defendant that the act was unconstitutional, as impairing the obligation of the contract of the state, and as taking its property without compensation therefor. But the court held the contrary, and sustained the statute. This court said in City of Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 269: "There have been many decisions where new highways have been laid across railroads, and the railroad company have claimed damages for increased liability to accidents at the crossings, or for increased expense of ringing the bell, or for liability to be ordered by the commissioners to build a bridge over the track, or to keep gates or flagmen. All such claims for damages, and all claims that were not direct and immediate burdens, have been uniformly holden too contingent and remote to be the basis of an assessment for damages." There can be no doubt of the right of the legislature to require railroad companies to bridge their crossings of existing highways at their own expense. The case of English *v.* Northampton Co., *supra*, fully recognizes that right, and it is expressly held in Appeal of New York & N. E. R. Co., 58 Conn. 532, 45 Am. & Eng. R. Cas. 109. In the latter case this court says "that such crossings are public nuisances, dangerous to human life, and no man has a vested interest in the creation or continuance of such a nuisance. In the exercise of the power of protecting human life the legislature may at any time, and without notice, abate it, or prevent its existence." The same right is strongly affirmed in People *v.* Boston & A. R. Co., 70 N. Y. 569.

The applicant argues that the law being so that, if a factory building must be raised or lowered, shored up or moved, in consequence of the taking of land of a manufacturing company for a highway, such company must be paid enough to make good the expense so necessitated, therefore the same rule must be adopted in respect to the construction of the bridge in this case, required by the law. But the cases stand upon a very different footing. In one the damage is the direct, natural, unavoidable result of the taking. In the other the damage is in no way directly or naturally connected with the taking, but artificially, and by means of a statute which has respect to the safety of the public, and not

to the damage of the party whose property is taken, or to the benefit of the party who takes it.

The question before us is an interesting one, and not entirely free from difficulties. The statute requires the applicant to construct a bridge over the highway which is laid out across its track. Now, because it owned the land taken for the highway crossing in fee, and it was therefore taken under the exercise of the right of eminent domain, can the applicant demand, by way of just compensation, that the one-half of the expense, which the law requires him to pay, shall be paid back to him by the respondent? We think not. Compensation for expense arising through such statutory obligation is not a legal element of damage. There is no right to compensation for what the law says shall be done at the expense of the railroad company. It is not a taking of property to compel it to pay one-half the expense of building a bridge to protect the public, nor damage incident to the taking of property within the true meaning of the words. We cannot hold that a duty which the state has most justly imposed upon the applicant as its share towards the protection of life should be turned into an element of damage, for which compensation must be made when circumstances arise which create the duty. We are well aware that there are decisions that, where highways cross a railroad, the expense of cattle-guards, signs, and planking is an element of damage which must be paid for. Different states have decided differently upon this point. Mills, Em. Dom. § 33. Perhaps it is impossible to discriminate between those cases where compensation has been awarded and the case at bar. But the precise question here involved is substantially novel, and, at the risk of antagonizing the rule, if it exists, of allowing compensation for the expense of erecting statutory safeguards, we must decide this case upon the principles we have stated. The superior court is advised to assess damages in favor of the applicant to the amount of $250, and to render judgment accordingly. The other judges concur.

Laying out Highway Across Railroad Track—Damages to which Company is Entitled.—See Kansas Central R. Co. *v.* Board, etc., of Jackson County, (Kan.), 46 Am. & Eng. R. Cas. 26; State *ex rel.* St. Paul, M. & M. R. Co. *v.* Shardlow, (Minn.), 45 *Id.* 106; State *ex rel.* St. Paul, M. & M. R. Co. *v.* District Court, (Minn.), 42 *Id.* 241, note 247; State *v.* Chicago, B. & Q. R. Co. (Neb.), 42 *Id.* 248, note 253.

KENTUCKY CENTRAL R. CO.

v.

COMMONWEALTH.

(*Kentucky Court of Appeals, February 4, 1892.*)

Statute Requiring Watchman at Crossing—Constitutional Law.—A statute requiring a particular railroad company to keep a watchman at a certain turnpike crossing, is not invalid on the ground that it is partial or discriminating legislation.

APPEAL from Fayette Circuit Court.

Indictment against the Kentucky Central Railway Company for failing to keep a watchman at a turnpike crossing. From a conviction defendant appeals.

Breckenridge & Shelby for appellant.

W. J. Hendrick and *R. Reid Rogers*, for the Commonwealth.

PRYOR, J.—The legislature passed an Act imposing a penalty on the appellant in the event it failed to keep a watchman where its track crosses the Lexington and Cynthiana turnpike; the Act also requiring a performance of this duty. The company neglected or refused to comply with this statute, and on a hearing, when the law and facts were submitted to the court, (the company having been indicted,) the penalty was enforced. The case is brought here by the company, on the ground that such legislation is partial, and discriminates against its road and in favor of like roads in the state.

Case stated.

There is no plainer proposition than the power of the legislature to regulate corporations such as that of the appellant, in order to provide for the public safety. Flagmen may be required to be stationed at dangerous places or crossings, when it is deemed necessary to the security of those traveling, either upon the highway where the railroad crosses it or on the train. It is a police regulation that is never surrendered by the state; and for a violation of such laws, enacted for the benefit of the public, and to insure safety in travel, the company will be liable both in civil and penal proceedings. Cooley, Const. Lim. (3d Ed.) p. 716. The legislature cannot be said to be partial, as the danger attending travel at the particular place may require more care and watchfulness than at points on the same or on other roads. It is only where the danger

Act valid as police regulation.

exists that such regulations for the public security may be exercised. It is said that the regulation is unreasonable. This may be, but, if so, we find no evidence in the record showing such a state of case, and, in the absence of such testimony, the legislative judgment must prevail. Judgment affirmed.

Watchman at Crossing—Object of City Ordinance Requiring.—The object of a city ordinance, in requiring railroads to station a watchman at street crossings used by them, is to prevent travelers from going on the crossing when trains are approaching, and not to give warning of danger when it is too late to avoid it. Dickson *v.* Missouri Pacific R. Co., 104 Mo. 491.

Failure to Station Watchman at Crossing—Contributory Negligence of Traveler—Proximate Cause.—In Dickson *v.* Missouri Pacific R. Co., 104 Mo. 491, it is held that an instruction, in an action against a railroad for personal injuries, which tells the jury, that, if they found the injury was caused by the failure of defendant to station a watchman at the crossing in question, the defendant was liable, unless the plaintiff was guilty of negligence, directly contributory to the accident, is not erroneous because it does not require that the absence of the watchman must have been the direct and proximate cause of the accident.

Negligence of Flagman—Evidence as to How Flagman Occupied His Time.—In Chicago, R. I. &, P. R. Co. *v.* Clough, (Ill., May 7, 1891), 29 N. E. Rep. 184, (affirming, on rehearing, 45 Am. & Eng. R. Cas. 137), the supreme court of Illinois held that the admission of evidence that the flagman at a crossing, in addition to watching the crossing, was in the habit of cleaning the switchmen's lamps for pay, is harmless error, where it is conceded that he knew of the approach of the train that caused the injury, and the jury specially found that he first gave the plaintiff a signal to cross the track and afterwards gave him a signal to stop, but too late to avoid the injury, since the specific acts of negligence proved were sufficient to justify a judgment for the plaintiff.

DUVALL

v.

BALTIMORE & OHIO R. CO.

(73 Maryland, 516.)

Injury at Crossing—Horse Frightened by Escape of Steam.—A railroad company is not liable for injuries sustained at a crossing by a traveler on the highway thrown from her horse, which was frightened at a sudden escape of steam from an automatic safety valve, attached to a locomotive, rightfully standing on the track near the crossing, although there was no one on the engine at the time, it being shown that the locomotive when built was gauged to blow off at a certain pressure and that neither the engineer nor the fireman had any control over the valve.

Failure to Use "Muffler" to Suppress Noises of Escaping Steam.—The failure of the railroad company to use a "muffler," a contrivance devised to suppress the noise of escaping steam, will not render it liable for such an injury, although it appears that such device is in general use on railroad locomotives.

APPEAL from Carroll Circuit Court.

Jos. D. Brooks, *Wm. A. McKeldip*, and *H. M. Clabaugh* for appellant.

John K. Cowen, for appellee.

ROBINSON, J.—We agree with the court below that there is no evidence in this case from which the jury could fairly and reasonably find negligence on the part of the defendant company. The freight train was standing on the track at Mount Airy station, near a public crossing, waiting for telegraphic orders to move. The plaintiff, on horseback, rode up to the crossing, saw the engine on the track, and saw the flagman standing by the side of the crossing, with his flag furled, thus indicating there was no danger to be apprehended from the movement of the trains to persons desiring to cross the track; and while the plaintiff was in the act of crossing the track there was a sudden escape of steam from an automatic safety-valve attached to the engine, in consequence of which her horse was frightened, and she was thrown on the ground and injured. The defendant's engines are gauged to carry a certain pressure of steam before they are put on the road, and when the pressure reaches this point the steam escapes through the safety-valve, acting automatically, and neither the fireman nor engineer have any control over it. This, in short, is the plaintiff's case, and if so, there is no evidence, it seems to us, from which negligence can fairly be imputed to the defendant. Its train was lawfully on its track—this cannot be disputed; and the noise which frightened the plaintiff's horse was caused by the escape of steam through an automatic valve—an attachment which it had the right to use in operating its engine. But then it is said the plaintiff had the right to cross the defendant's track. This is true, and the case then is one in which two parties have equal rights, in the exercise of which injury may result to one of them with or without liability, according to the conduct of each. It was no doubt the duty of the defendant in the management of its train and engine to exercise reasonable care and prudence to avoid injury to the plaintiff and to others crossing its track; but to hold the defendant liable there must be some evidence of negligence.

No evidence of negligence.

Now, it was argued there was negligence in permitting the pressure of steam to reach a point at which it escapes through the safety-valve while the train was standing on its track near a public crossing, but to this we cannot agree. Here was an engine attached to twenty-eight freight-cars, going up a high grade, requiring a full pressure of steam. It had reached the sta-

Pressure of steam not excessive.

tion, waiting to move at a moment's notice. To have slackened the fire (and this was the only way by which the pressure could have been reduced) would have been to deprive the engine of a pressure of steam absolutely necessary to its movements. The pressure of steam, under such circumstances, must be left to the judgment and discretion of the engineer. It is a mistake to assume that the point at which the steam escapes is the danger point; on the contrary, it is one far below the danger point; it is one at which from an abundance of caution the steam is permitted to escape in order to avoid all possible risks. When the train reaches a station and is waiting for orders to move, the pressure must necessarily increase, and the noise caused by the escape of steam through an automatic safety-valve must, under such circumstances, be considered as a noise necessarily incident to the movement and operation of the engine. But then it is said there was no one at the time on the engine. How could this affect the question? The point at which the steam escapes is fixed before the engine leaves the company's shops, and over it neither the engineer nor firemen have any control. So it seems to us there is no evidence here to prove that the defendant did anything which it ought not to have done, or omitted to do anything which, under the circumstances, it ought to have done.

We agree also with the ruling of the court in regard to the evidence offered in the first exception. Here the plaintiff offered to prove by the witness that there was an appliance in general use on railroads known as a "muffler," by which the noise caused by the escape of steam through a safety-valve is to a certain extent suppressed. This evidence was offered for the purpose of proving negligence on the part of the defendant in not using such an appliance. Now, the duty of a railroad to its passengers, for the safe carriage of whom it is bound to exercise the highest degree of care, may require it to adopt such approved appliances as have been found after a fair and thorough trial to contribute to the safety of railroad operations, and which can be practically used. But we are not now dealing with an injury to a passenger, but to a person attempting to cross the defendant's track, and towards whom it was the duty of the defendant to exercise reasonable care and prudence to avoid injury. The noise which frightened the plaintiff's horse was caused by the escape of steam through a safety-valve attached to the engine—an appliance in ordinary use, and attached to all the defendant's engines; and we are not prepared to hold that it was the duty of the defendant towards persons crossing its tracks to use every

Evidence as to use of muffler.

possible contrivance that human ingenuity might devise for the purpose of suppressing noises caused by the escape of steam or from the movement of trains. We have been referred to no case which goes to this extent, nor do we think that such a contention can be supported on any sound principle. We must therefore affirm the judgment below.

Horses Frightened by Noises from Locomotives—Liability of Company.—The right of a railroad company to operate its road includes the right to make all the noises incident to the movement and working of its engines, as the escape of steam, and to give proper and usual admonitions of danger by blowing the whistle, ringing the bell, etc. Accordingly, a person whose horse, in a buggy at a public crossing, becoming frightened at the noises or movements of a train, runs away and is injured, has no cause of action against the railroad company, unless the acts of its servants, which caused the fright of the animal, were negligent or wanton and malicious, and were done in discharge of their business for the company. Stanton *v.* Louisville & N. R. Co., 91 Ala., 382. If, however, the employes of the company acted negligently or wantonly in making the noises, the company will be liable. Indianapolis Union R. Co. *v.* Boettcher (Ind., Oct. 15, 1891), 28 N. E. Rep. 551. Thus, a Texas case was an action against a railroad company for injuries sustained by plaintiff's wife from the running away of horses attached to a four horse wagon in which she was riding. There was evidence that plaintiff, who was driving his wife along a highway towards the crossing of defendant's railroad, hearing the whistle of an approaching engine, left the wagon in her charge, and ran ahead to turn back from the railroad cattle which his sons were driving, having accomplished which he returned, and took hold of one of the horses. After reaching a point from which the horses could be readily seen, the engineer blew several loud and sharp whistles, before and after reaching the crossing, frightening the horses, and causing them to run away. Plaintiff testified that the horses became frightened at the first whistle, and that their fright could be seen by those in charge of the train. The fireman, who was on the tender, and some of the passengers saw their fright before the whistles were blown the second time, and the engineer did not testify as to whether he saw them or not. *Held*, that a verdict for plaintiff was warranted, on the ground that the engineer negligently and wantonly blew the whistle when it was unnecessary. Gulf C. & S. F. R. Co. *v.* Box (Tex., Oct. 20, 1891), 17 S. W. Rep. 375. And it is negligence for the servants of a railroad company unnecessarily to permit the escape of steam from and the unusual noises by an engine in their charge so as to frighten a person's horse. Indianapolis Union R. Co. *v.* Boettcher (Ind., Oct. 15, 1891), 28 N. E. Rep. 551. Especially after informing the traveller that it is safe to cross the track, although such steam and noises proceeded from the automatic operation of the engine. Keech *v.* Rome, W. & O. R. Co., 59 Hun (N. Y.), 617.

In an Iowa case it appeared that the plaintiff was lawfully upon the defendant's depot grounds, unloading corn into a crib, which was near two highway crossings, when the defendant's engine passed without signaling and frightened the plaintiff's team, causing them to run away and injure the plaintiff. A statute provided that no railroad engine should approach a highway crossing without giving a signal, and made the neglect to give such signal a misdemeanor. It was held that the defendant was liable, although the plaintiff was not attempting to use the crossing. Lonergren *v.* Illinois Central R. Co, (Iowa, Oct. 10, 1891), 49 N. W. Rep. 852. And, in a New Hampshire case, where it was held that a railroad com-

pany was liable for injuries caused by plaintiff's horses being frightened by a locomotive blowing off steam, which approached without giving any signal, it was said that the fact that the escape of steam from the locomotive was regulated by an automatic valve, was no justification for allowing the steam to escape, and it was a question of facts for the jury whether the company was negligent in permitting the escape of the steam. Presby *v.* Grand Trunk R. Co. (N. H., July 31, 1891), 22 Atl. Rep. 554.

In Illinois the negligence of a railroad company in omitting to whistle or ring a bell when approaching a crossing as required by statute has been held not to render the company liable to a farmer who is plowing in his field near the crossing, and who is injured through his horse taking fright at the train, since the statutory requirement is only intended for the benefit of travelers on the highway. Williams *v.* Chicago & A. R. Co., 135 Ill. 491. And a Texas statute (Rev. St. art. 4245), authorizing a recovery for animals run over by a railroad train, has been held not to apply to a case where animals are injured not by actual collision with a locomotive or car, but through fright caused by a train. St. Louis A. & T. R. Co. *v.* Felton, (Tex. App., Dec. 12, 1889), 14 S. W. Rep. 1072.

In an action for injuries received, owing to a horse becoming frightened at noises made by an engine, it is proper to show the amount of travel across the railroad at the place of the accident, as bearing on the defendant's negligence. Indianapolis U. R. Co. *v.* Boettcher (Ind.), 28 N. E. Rep. 551.

And see generally, as to the liability of railroad companies for injuries caused by horses becoming frightened owing to noises and obstructions at crossings, Ohio & M. R. Co. *v.* Trowbridge (Ind.), 45 Am. & Eng. R. Cas. 200, note 205; St. Louis, I. M. & S. R. Co. *v.* Hall (Ark.), 42 *Id.* 208; Abbott *v.* Kalbus (Wis.), 39 *Id.* 594, note 597, 598; Bailey *v.* Hartford & C. V. R. Co. (Conn.), 37 *Id.* 483, note 488; Pense *v.* Chicago, R. I. & P. R. Co. (Iowa), 42 *Id.* 126; Pittsburg, C. & St. L. R. Co. *v.* Kitley (Ind.). 37 *Id.* 511; Brown *v.* Eastern & M. R. Co. (Eng.), 37 *Id.* 558.

Horses Frightened by Car Left near Crossing—Gentleness of Team.—In an action against a railroad company for alleged negligence in leaving a freight car so near a crossing that it frightened plaintiff's horses and caused them to throw him out of his buggy, the jury rendered a general verdict for the defendant, and specially found that plaintiff's team was not one of ordinary gentleness. The court had instructed the jury that plaintiff's right to recover depended on the fact that his team was one of ordinary gentleness, and this instruction was not excepted to. *Held*, that alleged errors in giving other instructions and submitting other interrogatories to the jury were not prejudicial, since, under such instruction and special finding, the plaintiff could not recover. Fiske *v.* Chicago, M. & St. P. R. Co. (Iowa, June 8, 1891), 48 N. W. Rep. 1081.

PENNSYLVANIA CO.

v.

LANGENDORFF.

(Ohio Supreme Court, May 5, 1891.)

Contributory Negligence—Exposure of Person to Save Life—Question for Jury.—It is not negligence *per se* for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory neg-

ligence in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court.

Same—Same.—While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment.

Same—Proximate Cause of Injury.—In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance.

ERROR to Lucas Circuit Court.

The defendant in error recovered a judgment against the plaintiff in error in the court of common pleas of Lucas county for damages resulting from an injury received by him while rescuing a child of tender years, who had fallen in front of an advancing freight train of the plaintiff in error. This judgment was affirmed by the circuit court, and thereupon these proceedings were brought to obtain a reversal of the judgments of both courts. Any further statement of facts necessary to understand the questions decided will be found in the opinion.

E. W. Tolerton, for plaintiff in error.

Bissell & Gorrill, for defendant in error.

BRADBURY, J.—The defendant in error, in June, 1885, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of the plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl about four years old. The plaintiff in error had constructed a safety gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about 7 o'clock in the evening, or a little later, but while it was yet light. The watchman had finished his day's labor and gone away, and the gate was raised (or open), though the street was, perhaps, as extensively used at that hour as at any other part of the day. A local freight train was past due, and approaching at a higher rate of speed than that prescribed by the ordinances of the city. The defendant in error and the nurse were engaged in conversation at a point from which the approaching train was in view for a considerable distance, though exactly how far away it

Case stated.

could be seen is left in some doubt. The little girl, while the nurse and defendant in error were conversing, wandered across the railroad track, and, seeing or hearing the approaching train, became excited by the sight or noise or both, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and, probably, that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains. That the safety gate was raised, and the watchman absent, was not disputed at the trial, so far as the record discloses; and the evidence is amply sufficient to warrant the jury in finding that the train was being run at an unlawful rate of speed, so that in both these particulars the negligence of the railroad company was established. It is contended, however, that the negligence of the railroad company should have related to the party injured, and that the jury, in passing upon the case of the defendant in error, should not have taken into consideration the rights of the rescued child, but should have confined itself to considering the relations existing between him and the railroad company; and in this connection the plaintiff in error requested the court of common pleas to charge the jury as follows: "The plaintiff's right to recover depends entirely upon the fact that the defendant was guilty of negligence in its relations to this plaintiff. The jury, in deliberating upon your verdict, must not consider the rights of the child. This action has nothing to do with her rights. The sole questions here are was the defendant guilty of negligence which caused the plaintiff's injuries, and was the plaintiff himself guilty of contributory negligence?"

This request was properly refused. Negligence does not usually relate to any one in particular, and does not in any case so relate unless there is some special duty owing to the individual affected by the negligent act or omission. In the case under review the railroad company owed no special duty to either the rescuer or the rescued that it would not have owed to any individuals similarly situated. The obligation was to the public generally; and any person who, without fault on his part, received an injury in consequence of its failure to discharge this obligation, may recover from it compensation therefor. No other relation is necessary, where the obliga-

Duty of company to the plaintiff.

tion is to the public, than that the one by its negligence has caused injury to the other without the latter's fault. It is also objectionable in another particular—that of requiring the jury to ignore the rights of the child. It is true that the child in its relations to the railroad company might have a right of action for injuries received by it, and yet no right accrue to the defendant in error for those received by him in the same accident. The circumstance that the child had a right of action could not be conclusive that the defendant in error had one also, though the same blow of the locomotive injured both, for the negligence of the latter might contribute to the result in a manner to defeat his recovery, while no negligence could be imputed to the child. If it was the object of this request to impress upon the minds of the jury the proposition above stated, that the rights of action of the child and its rescuer against the railroad company were distinct, the language selected was not well chosen. The phrase: "The jury, in deliberating on your verdict, must not consider the rights of the child. This action has nothing to do with her rights,"—was well adapted to mislead the jury into the belief that the imminent danger of the child, and its right to be rescued therefrom, were to be excluded from their consideration. This view would have defeated the recovery, for the very ground upon which the defendant in error founded his claim was that the imminent peril of the child warranted the risk he assumed in undertaking its rescue.

This brings us to the consideration of the main question. Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntary passing in front of a moving train to rescue a child who had fallen in front of it; therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court: "It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the railroad company responsible in damages for this injury it must be shown (1) that the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the

Exposure of person to save life not negligence per se.

railroad company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. * * * If you find that the peril to which the child was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. * * * If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort."

Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent; and that, however commendable his conduct may have been when viewed from the standpoint of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore, what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some states, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at

this public crossing, and the unlawful rate of speed at which the train was running towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done suggests that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority.

Same—Authorities reviewed

In Evansville & C. R.Co. *v.* Hiatt, 17 Ind. 102, language is used by the judge in deciding the case, which, to some extent, supports the doctrine, but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obitur dictum*. The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In Eckert *v.* Long Island R. Co., 43 N. Y. 502, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri. Linnehan *v.* Sampson, 126 Mass. 506; Donahoe *v.* Wabash, St. L. & P. R. Co., 83 Mo. 560; Beach, Contrib. Neg. p. 45, § 15; Whart. Neg. § 314; Pierce, R. R. 329. The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in

other courts. Carroll *v.* Minnesota Valley R. Co., 14 Minn. 57 (Gil. 42); Pennsylvania Co. *v.* Roney, 89 Ind. 453, 12 Am. & Eng. R. Cas. 223; Cottrill *v.* Chicago, M. & St. P. R. Co., 47 Wis. 634.

We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the rescue whether the act was rash or not, and in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty. Judgment affirmed.

Question was properly left to jury.

Exposure of Person in Attempt to Save Life is Not Contributory Negligence.—See Condiff *v.* Kansas City, Ft. S. & G. R. Co. (Kan.), 48 Am. & Eng. R. Cas., 417, note 423.

DELAWARE, LACKAWANNA & WESTERN R. CO.

v.

CONVERSE.

(*139 United States, 469.*)

Negligence—Questions of Law and Fact—Withdrawing Case from Jury.—In actions founded upon negligence, the court may withdraw the case from the jury and direct a verdict for the plaintiff or defendant, as the case may be, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it.

Injury at Crossing—Flying Switch—Negligence per se.—The severing of a train of cars in the night time, leaving a part of them, uncontrolled except by ordinary brakes, to run across a public highway at grade without some warning by a flagman, or by bell or whistle, or in some other effective way, that they were approaching, is such a disregard of the rights of a person using the highway, who is injured in attempting to drive across the track after the passage of the first section of the train, that the court is justified in saying, as a matter of law, that it constituted negligence on the part of the company, for which such traveler could recover, unless he had been guilty of contributory negligence.

Contributory Negligence—Instructions—When Findings of Jury will not be Disturbed.—Where the jury passes upon the issue of the contributory negligence of a person crossing a railroad track at a highway, and finds, on conflicting evidence, that he was not negligent, this finding will not be disturbed where the court has charged that it was plaintiff's duty to stop, look, and listen, at a safe distance from the track, for approaching trains; that if, after crossing the first and second tracks, the plaintiff, by the exercise of great care, could have discovered the approach of cars on the third track, he was guilty of negligence in not stopping short of that track; and that, if the plaintiff's view was obstructed, he was negligent if he did not stand up in his carriage, if, by so doing, he could have seen over the obstruction.

Evidence as to Existence of Highway.—Evidence that the highway at the crossing in question had existed for more than thirty years, and was established before the railroad, was not incompetent to show that the company could not have been ignorant of the fact that at the crossing in question there was a public highway.

Evidence as to Plaintiff's Prior Negligence.—In an action for injuries at a railroad crossing, evidence as to the manner in which the plaintiff had crossed the tracks a few hours before the accident, to show negligence on his part, is irrelevant.

Evidence as to Admission of Watchman as to Speed of Train.—Evidence that the company's watchman at the crossing had admitted, on the night of the accident, that the rear section of the train was going at about fifteen miles an hour, was admissible to impeach his credibility, where, upon his cross-examination, he denied making such a statement.

IN error to the Circuit Court of the United States for the district of New Jersey.

The object of this action is to recover damages for injuries, in person and property, alleged to have been sustained by the defendant in error (who was the plaintiff below) in consequence of the negligent manner in which the cars of the plaintiff in error were operated on the occasion when such injuries were received. The jury returned a verdict against the railroad company for $14,000. That amount being regarded by the court as excessive, the plaintiff remitted all of it except $7,500, and judgment was entered for the latter sum.

While there was some conflict in the evidence relating to certain matters, the following facts were clearly established: The plaintiff, at the time of the injuries in question, and for ten years previous thereto, was the county physician of Hudson county, N. J. In the discharge of his duties, he went daily from Jersey City to the county farm, on which were located a penitentiary, insane asylum, and almshouse belonging to the county, and which were reached by a public road crossing the Boonton branch of the Delaware, Lackawana & Western Railroad at Secaucus station in the vicinity of the county farm. That road, commonly called the "county road," is built through meadow lands, which are

unoccupied, except as they have been appropriated and used for the purposes of the railroad company. There is, substantially, no travel upon it except by those going to and from the county farm. About a half-dozen wagons or vehicles on an average pass over the crossing every night. The road is from twenty-five to thirty feet in width, and macadamized, and without a fence upon either side of it. At the crossing in question there are two main tracks of the railroad, one called the "east-bound" and the other the "west-bound" track; and five other tracks—two on the south side of the east-bound track, and three on the north side of the west-bound track.

The plaintiff, on the 13th day of March, 1886, went from Jersey City to the county farm over this county road, in a four-wheel buggy or phaeton, having a top or hood that could be let down or raised. He reached the county farm, crossing the railroad tracks at Secaucus station, between six and seven o'clock in the evening of that day, and started back to Jersey City about 8 o'clock. As he approached the station on his return, sitting in his buggy, with the top up, and moving at an easy gait, he observed, about fifteen minutes after 8 o'clock, at a distance of 100 feet or less, a train of freight-cars, drawn by a locomotive engine, coming on the defendant's road from the west. The train, just before reaching the point where the county road crossed the railroad tracks, was severed by the direction of those in charge of it; the engine, with the twelve cars next to it, going ahead over a switch into the railroad yard, while the other cars, twelve in number, with a caboose attached to them, making what is called a "running switch," were left to follow, by their own momentum, without being controlled otherwise than by ordinary brakes. When the engine and cars constituting the first section of the train passed the county road there was a gap between the two sections of the severed train, the rear section being about ninety feet behind the other, and passing across the county road at the rate of about ten miles an hour. The plaintiff attempted to cross the railroad tracks as soon as the engine and the cars attached to it had cleared the county road. There were neither gates, lights, nor flagmen at the crossing. There was no light on the front car of the rear section of thirteen cars when they reached the crossing. The only light upon the cars of that section when they reached the crossing was in the caboose. Before reaching the crossing, a brakeman on the rear section had a lantern that was placed on the platform at the rear end of the first car of that section, which platform was, however, two feet below the roof of the car. This light was ex-

tinguished by the wind before the rear section of the train reached the crossing. After the plaintiff got on the railroad tracks with his buggy, but before reaching the east-bound main track, he discovered the cars constituting the rear section of the train, distant but a few feet, coming down upon him, and too close to be avoided. The train hit his buggy, entirely destroying it, and seriously, if not permanently, injuring him.

Upon substantially these facts, about which there could not be any dispute, the court instructed the jury as matter of law that the railroad company was negligent in respect to its duty to persons traveling upon the public road in question; and that the plaintiff was entitled to recover damages for any injuries sustained by him as the result of such negligence, unless it appeared that he contributed to such injuries by his own carelessness.

It is contended that the court erred in not submitting to the jury the issue as to defendant's negligence.

J. D. Bedle, for plaintiff in error.

J. B. Vredenburgh, for defendant in error.

HARLAN, J.—Undoubtedly, questions of negligence, in actions like the present one, are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Phœnix Mut. L. Ins. Co. *v.* Doster, 106 U. S. 30, 32; Griggs *v.* Houston, 104 U. S. 553, 8 Am. & Eng. R. Cas. 359; Randall *v.* Baltimore & O. R. Co., 109 U. S. 478, 482, 15 Am. & Eng. R. Cas. 243; County of Anderson *v.* Beal, 113 U. S. 227, 241; Schofield *v.* Chicago, M. & St. P. R. Co., 114 U. S. 615, 618, 19 Am. & Eng. R. Cas. 353. "It would be an idle proceeding," this court said in North Pa. R. Co. *v.* Commercial Bank, 123 U. S. 727, 733, "to submit the evidence to the jury when they could justly find only in one way." In the present case, it was incumbent on the plaintiff, as a condition of his right to recover, to prove that the defendant was guilty of negligence, resulting in his being injured, and, that issue being in his favor, he was entitled to a verdict, unless it appeared that his own negligence substantially contributed to his injury. If the evidence was so conclusive against the defend-

When question of negligence may be withdrawn from jury.

ant upon the question of its negligence that the jury could not reasonably find to the contrary, it was competent for the court, within the doctrines of the cases above cited, to so instruct them, leaving the jury to determine the question of the plaintiff's negligence, in respect to which the evidence was conflicting.

The inquiry, therefore, is whether the court erred in holding, as matter of law, under the evidence, that the defendant was guilty of negligence. Upon this question we entertain no doubt. While those using a public highway are under a duty to keep out of the way of railroad cars crossing it, and to exercise to that end such care as the circumstances make necessary, the railroad company, in moving cars upon its road, is bound to observe like care towards those who, while traveling upon such highways, whether on foot or in vehicles, are obliged to pass over its tracks. The right of a railroad company to the use of its tracks for the movement of engines and cars is no greater in the eye of the law than the right of an individual to travel over a highway extending across such tracks. The former is granted subject to the condition, necessarily implied, that it shall be so used as not unreasonably to interfere with or abridge the latter. The obligation to use one's property in such a manner as not to injure that of others rests equally upon corporations and individuals. The duty of railroad companies whose tracks cross public highways at grade to give warning to those travelling upon them has been under consideration in many adjudged cases. When the subject is regulated by statute it may not be difficult, in a particular case, to determine whether the railroad company has performed its duty in that regard to the public. If there be no statute prescribing in what mode the necessary warning shall be given when a train of cars is approaching a public highway crossing a railroad track at grade, the question of negligence must be determined by the special circumstances of each case. In some localities, in thickly settled communities, greater vigilance and more safeguards are required upon the part of the railroad company than would be necessary in other localities. What would be due care in one locality might be negligence in another. A very high degree of caution and circumspection is required under some circumstances. Without attempting to formulate a general rule applicable in every case of injury to person or property, it is sufficient here to say that the severing of defendant's train of cars in the nighttime, leaving a part of them, uncontrolled otherwise than by ordinary brakes, to run across a public highway at grade,

Making flying switch at crossing held negligence per se.

without some warning by a flagman, or by bell or whistle, or in some other effective mode, that they were approaching, was in such obvious disregard of the rights of persons using that highway that the court was justified in saying, as matter of law, not simply that such facts were evidence of negligence, but constituted negligence upon the part of the company. It was justified in so instructing the jury, because every one knows, and therefore the court below knew, that such use of the defendant's tracks where they crossed the county road unnecessarily endangered the safety of any one who at the time crossed the railroad tracks while travelling on that highway. The county road upon which the plaintiff was travelling was not, it is true, much used by the general public; but that fact only affects the degree of care the defendant was bound to observe, and does not establish a right to have its cars approach the crossing where the plaintiff was hurt, and over which the public were entitled to pass, as if there were no highway there at all. The court, in our judgment, did not err in holding as matter of law, upon the undisputed facts in the case, that the defendant was guilty of negligence in the particulars to which we have adverted.

The next question is as to the instructions relating to the alleged contributory negligence upon the part of the plaintiff. In Baltimore & P. R. Co. *v.* Jones, 95 U. S. 439, 442, it was said that, where the damage was occasioned entirely by the negligence or improper conduct of the company, the plaintiff is entitled to recover; but that, where "the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened," he could not recover. So, in Chicago, R. I. & P. R. Co. *v.* Houston, *Id.* 697, 702, which was an action for damages against a railroad company upon the ground of negligence, it was said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in those particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive

Instructions as to contributory negligence.

her of any right to complain of others." Again, in Kane *v.* Northern Cent. R. Co., 128 U. S. 91, 94, which was an action by an employe of a railway company to recover damages for personal injuries alleged to result from its negligence, this court said "that an employe is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so." See, also, District of Columbia *v.* McElligott, 117 U. S. 621, 633. These principles are applicable to the issue in this case as to contributory negligence.

The jury were told that while it was the duty of the railroad company to exercise great care to warn travelers on a public highway of approaching trains, it was an equally imperative duty in travelers to exercise the same degree of care to avoid and keep off the railroad tracks when trains are approaching the crossing; that, if the plaintiff advanced to and upon the tracks of the railroad without the exercise of such care to discover the approach of trains, or attempted intentionally to pass in front of a train within dangerous proximity, he was guilty of negligence; that when at a safe distance from the tracks, where the opportunity of seeing was best, it was his duty, especially in view of the dangerous character of this crossing, to stop, look up and down the road, and listen for trains; and that, if he did not so stop, look, and listen, he was guilty of carelessness; that if, after crossing the first or second track, the plaintiff, by the exercise of such care, could have discovered the approach of the train which struck him, he was guilty of carelessness in not discovering it, and stopping short of the east-bound track; that the jury must judge of the plaintiff's opportunity of seeing whether standing cars were in the way, and, if they were, whether he could have seen over them by standing up in his carriage; that if he could he should have stood up; that of all this the jury must judge; and that, if they found from the evidence that the plaintiff was guilty of such negligence, he could not recover.

Whatever objections the plaintiff may have urged against these instructions, surely the defendant, upon the issue as to the plaintiff's negligence, was not prejudiced by what was thus said by the court to the jury. The jury have found that the plaintiff was not guilty of contributory negligence. That question was properly submitted to them upon all the evidence, which was contradictory; and, as no error of law in reference thereto was committed to the prejudice of the

defendant, we have no authority to review their finding in that respect. Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 447; New York Cent. & H. R. R. Co. *v.* Fraloff, 100 U. S. 24, 31.

It is assigned for error that the court allowed the plaintiff, against the objection of the defendant, to prove that the highway in question was established before the railroad was constructed. We do not presume that this fact was at all important in the case. When the witness was asked whether the public highway was there before the railroad, the court properly observed that the responsibility of the defendant was not increased or diminished, whether the fact was one way or the other. But it permitted the witness to be asked whether the county road was an old and well-established highway. The question was then changed into an inquiry simply as to how long that highway had been established. The witness answered that he went over it in 1857. The object of this proof was, as we suppose, to show that the defendant could not be ignorant of the fact that at the crossing in question there was a public highway. In that view the evidence, though not important, was not incompetent. There was no dispute as to the existence of the county road as a public highway, and what the witness said, even if incompetent as evidence, could not possibly have affected the result.

Proof as to existence of highway.

Another error assigned is the refusal of the court to allow proof by the defendant of the fact that the manner in which the plaintiff crossed the railroad tracks between 6 and 7 o'clock in the evening, on his way from Jersey City to the county farm, showed negligence upon his part. Plainly, this evidence was irrelevant. It did not in any wise illustrate the issue as to whether the defendant was guilty of negligence, or whether the plaintiff was guilty of contributory negligence two hours later in the evening, when the plaintiff, returning from the county farm, attempted to cross the railroad tracks.

Evidence as to prior negligence of plaintiff.

At the trial below the plaintiff recalled a witness, Stewart, in rebuttal, and was permitted, against the objection of the defendant, to propound this question: "Did Mr. O'Brien tell you that night what speed, in his judgment, the train that hit the doctor was moving at the time it hit him?" The answer was "Yes; he said about sixteen miles an hour, positively." The action of the court in permitting this question and answer is assigned for error. O'Brien was the defendant's night yard-master at the station, and had testified in chief for defendant that the rear section of the train, when it

Evidence as to admission of watchman.

crossed the county road, was going about 10 miles an hour. He denied, upon cross-examination, that he said to Stewart, the night of the accident, that the rear section of the train was moving at the rate of 15 miles an hour, or that he used words to that effect. The object of the evidence to which the defendant objected was to impeach the credibility of O'Brien. It was competent for that purpose; but, if it was not, the admission of it is not ground for reversal. Whether the train, when it struck the plaintiff's buggy, was going at the rate of 10 or 16 miles an hour, the court rightly held the defendant guilty of negligence, leaving to the jury to determine upon the evidence the question of plaintiff's contributory negligence.

We perceive no error in the judgment, and it is affirmed.

Flying or Running Switches across Highways—Kicking Cars.—See Ferguson *v.* Wisconsin Cent. R. Co. (Wis.) 19 Am. & Eng. R. Cas. 285, note 291; White *v.* Fitchburg R. Co. (Mass.) 18 *Id.* 140, note 144; Lehigh & W. B. Coal Co. *v.* Lear (Pa.) 32 *Id.* 74, Howard *v.* St. Paul, M. & M. R. Co. (Minn.) 19 *Id.* 283.

In Alabama & V. R. Co. *v.* Summers, 68 Miss. 566, it was held that it is negligence *per se* for a railroad company to make a flying switch across the streets of a town along which persons are constantly accustomed to walk. And in Schindler *v.* Milwaukee, L. S. & W. R. Co., 87 Mich. 400, it was held that a finding that the railroad company was guilty of gross negligence in running over a person at a crossing, is supported by evidence that the company's employes operating a freight train, shunted three cars without any one thereon past the crossing, without any signal or warning, and that they knew that the driver of a team was approaching the crossing.

If, in a populous town, a detached car is negligently sent on a flying-switch, running rapidly in violation of law, and over a public crossing, and one on the crossing is injured by it, proof of contributory negligence not being clear, it is error for the court to instruct the jury to find for the defendant. Fulmer *v.* Illinois Central R. Co., 68 Miss. 355.

Failure of Person Crossing Track to Guard against Flying Switch—Contributory Negligence.—A woman, carrying a large bundle of clothing on her head, was walking south along an unused dummy track in Vicksburg, whereon many persons were accustomed to walk. Parallel with this on one side was a public street, and on the other defendant's railroad. A locomotive and five cars met and passed her, going north on the main line. They then stopped and ran back, two cars being diverted by a 'running or flying-switch" to a side-track, which curved and crossed the dummy line and adjacent street south of where she then was. As the train repassed her, the engineer and others made great efforts to warn her of the danger of the detached cars rapidly approaching behind her, but, because of the bundle on her head, these efforts were unavailing, and as she reached the crossing the cars struck and injured her. *Held*, proper to instruct that, if these facts existed, defendant was guilty of negligence, and to submit to the jury whether, under the circumstances, the woman acted with reasonable prudence. Alabama & V. R. Co. *v.* Summers, 68 Miss. 566.

GROSTICK

v.

DETROIT, LANSING & NORTHERN R. CO.

(*Michigan Supreme Court, March 18, 1892.*)

Injury at Crossing—Contributory Negligence—Failure to Look.—One who drives upon a railroad crossing without looking in the direction of an approaching train, although at any point within 150 feet of such crossing his view of the track was unobstructed for a long distance, is guilty of such negligence that no recovery can be had for his death owing to his being struck by the train, irrespective of any negligence on the part of the company in running the train at excessive speed or neglecting to give proper signals.

MCGRAFF, J., dissenting.

ERROR to Livingston Circuit Court.

Action to recover damages for the alleged negligent killing of plaintiff's husband. Verdict and judgment for plaintiff. Defendant brings error.

Charles B. Lothrop, for appellant.

W. H. H. Russell, for appellee.

LONG, J.—The plaintiff had a verdict and judgment in the court below for $18,143.50. The action was brought in the circuit court for Livingston county for the negligent killing of August Grostick, plaintiff's husband, on the afternoon of October 19, 1889, on a highway crossing just west of the station at Howell, on defendant's road. The negligence alleged in the declaration is that the defendant failed to sound its whistle or ring its bell continuously for at least forty rods before reaching the crossing, ran over the crossing at a great rate of speed, the crossing being a dangerous one; and the employment of careless and incompetent servants. The station at Howell is in the southern part of the town, at the extremity of a street known as "Cross street." Defendant's road runs at right angles with this street. Next west of Cross street is one which ends at an elevator, and does not cross the railroad track; and the street next west of this is known as the "Pinckney road" or "East street" and crosses the railroad track, and is the one upon which plaintiff's husband was killed. There is another street still west of this, crossing the railroad, called "Walnut street." The railroad runs nearly straight from the station, crossing these streets; and in crossing Walnut street turns

Facts.

more to the west, and at a distance of several hundred feet from Walnut street, enters what is known as the "Jewett Cut." The distance from Pinckney road, or East street, to the end or mouth of Jewett cut is 1,150 feet. East street crosses the railroad at an elevation of seven or eight feet above the natural surface of the ground, and from that point westward to the mouth of Jewett cut the railroad is upon an embankment of at least that height the entire distance. At a point 120 feet north of the railroad crossing on East street is the first house on the west side of that street or obstruction to the sight for the entire distance around the railroad track to the mouth of Jewett cut. Plaintiff's intestate, about half-past three o'clock in the afternoon of the day upon which he was killed, was going from the village of Howell forward along East street, or Pinckney road, driving a span of horses attached to a lumber wagon. He was alone and riding upon a seat upon the wagon box. When he had passed Mr. Sexton's house, 120 feet north of the railroad track, he could see the whole distance to the mouth of Jewett cut, as there was nothing to obstruct his view, and the track being elevated above the natural surface of the ground. Passing from Sexton's house to the track, there was no point at which he could not have seen the entire length of the railroad track to the mouth of Jewett cut. There was some obstruction to his view to the eastward, and he could not see the station of the defendant company until he had nearly approached the track, although plaintiff's counsel, in his brief, admits that the deceased could have seen eastward along this track towards the station when within 120 feet of the crossing. The train by which the deceased was struck was coming from the west, running at considerable speed, a little behind time, the time varying from five to fifteen minutes, as testified by different witnesses. According to the testimony of plaintiff's witnesses the train was running from twenty-five to thirty miles an hour. There was testimony showing that the bell was not rung nor whistle sounded for this highway crossing.

Upon the part of the defendant, it was contended that the bell was a steam bell ringer, rung continuously from station to station. Many persons upon the platform of the depot, who were waiting for the train and listened for its approach, testified that they heard the whistle blown just as the train was entering Jewett cut from the west. This is called the "station whistle." There is no contention but that this whistle was sounded. This point was some 1,400 feet west of the Pinckney road crossing. The witnesses testified that the deceased was driving along on a slow trot,

and some of them say that he appeared looking to the east. He was familiar with this crossing. As his horses reached the track the engine struck them and Mr. Grostick and his horses were instantly killed. The engineer of the engine was upon the south side of the cab, and did not see the deceased, on account of the dome and sand box and other things upon the engine. The fireman was on the north side of the cab, and a part of the way from Jewett cut he was occupied in attending to his fires. He says he saw the man approach slowly, but did not anticipate danger, and thought he would stop, until, when he was within twenty-five feet of the track, he says he saw him start up his horses, when he (the fireman) at once called to the engineer "Whoa! whoa!" upon which the engineer applied the air brakes and reversed the engine. The train was a heavy one, consisting of five cars, engine and tender, and being 304 feet in length.

Deceased was guilty of contributory negligence.

The only question which I shall discuss is whether there was any evidence to go to the jury showing or tending to show that the deceased was exercising due care in attempting to cross the railroad track in the manner and under the circumstances here stated. It has been repeatedly held by this court that a person about to cross a railroad track is bound to recognize the danger, and to make use of the senses of hearing and sight, and to ascertain, before attempting to cross, whether the train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk; and such conduct will be pronounced negligence by the courts, as matter of law. Lake Shore & M. S. R. Co. *v.* Miller, 25 Mich. 274; Pzolla *v.* Michigan Cent. R. Co., 54 Mich. 273; Rhoades *v.* Chicago & G. T. R. Co., 58 Mich. 263, 21 Am. & Eng. R. Cas. 659. It was said in Potter *v.* Flint & P. M. R. Co., 62 Mich. 22: "It is the duty of all highway travelers approaching a railroad crossing to keep a due lookout, and if they do not choose to heed what they ought to heed, they must bear the consequences." In Mynning *v.* Detroit, L. & N. R. Co., 64 Mich. 93, 28 Am. & Eng. R. Cas. 665, it was said by this court: "A railroad track is a warning of danger to those who go upon it, and persons about to cross are bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and if either cannot be rendered available the obligation to use the other is the stronger, to ascertain before attempting to cross whether the train is in dangerous proximity; and if they neglect to do this, and venture blindly or carelessly upon the track, it must be at their own risk. Such conduct is of itself negligence." This same doctrine is laid down by this court

in Haas *v.* Grand Rapids & I. R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; Matta *v.* Chicago & W. M. R. Co., 69 Mich. 109, 32 Am. & Eng. R. Cas. 71; Freeman *v.* Duluth S. S. & A. R. Co., 74 Mich. 86, 37 Am. & Eng. R. Cas. 501; Gebhard *v.* Detroit, G. H. & M. R. Co., 79 Mich. 586; Brady *v.* Toledo, A. A. & N. M. R. Co., 81 Mich. 616; Guta *v.* Lake Shore & M. S. R. Co., 81 Mich. 291; Underhill *v.* Chicago & G. T. R. Co., 81 Mich. 43; Apsey *v.* Detroit, L. & N. R. Co., 83 Mich. 432.

The trial court left the question of contributory negligence of the plaintiff to the jury as a question of fact for their determination, stating to them: "It becomes a question of fact for you to determine whether or not negligence exists on his part in attempting to cross or whether he acted, under the circumstances, as a man of reasonable caution and prudence would have acted under like circumstances. If you find from the evidence that he did not look and listen, and had no notice by sight or hearing, and if you find that no whistle was twice sounded, no bell rung, that he had no notice by sound of rumbling train or smoke, and ventured to cross, and that while crossing his danger was seen or known by the employes of the defendant at a sufficient distance from the road crossing to enable them to slacken the speed of the train, or even stop it, and that it was not done, that would be gross negligence on the part of the defendant in running its train, and it would not be thereby excused from liability."

Verdict should have been directed for defendant.

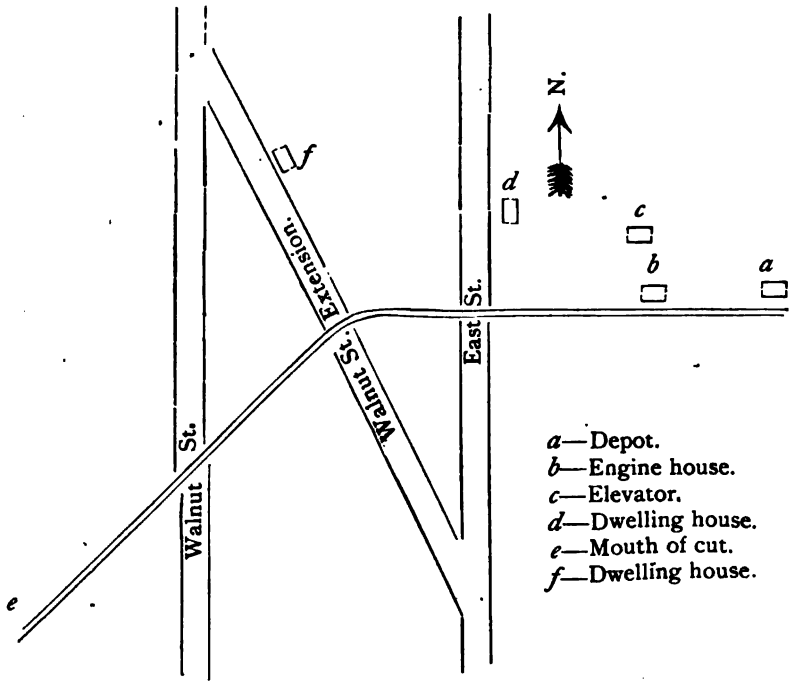
Under the circumstances here stated, the court was in error in thus directing the jury. The deceased was a man fifty years of age, of good health, sound in mind and body, his hearing and sight not defective. He had lived just east of Howell for many years, and was thoroughly familiar with this crossing. Applying these facts to the rules of law heretofore laid down by this court in the cases above cited, we think it was the duty of the court to have directed a verdict in favor of the defendant. The burden was upon the plaintiff to show, not only that the defendant was guilty of negligence in the premises—a point which we do not deem necessary to discuss—but that her intestate was exercising due care in approaching this crossing. Under the conceded facts in this case, when he was within 120 feet of the track, he had a clear unobstructed view of the track, every foot of the distance to the mouth of Jewett cut until he passed upon the track. Apparently he was looking eastward, and giving no heed whatever to a train approaching from the west. According to the testimony, he exercised no care whatever, but drove his team along without looking westward until he was struck

and killed. This was such carelessness that his administratrix should not, as a matter of law, be permitted to recover.

We need not discuss the other questions raised. Upon the ground here stated, the judgment below must be reversed, and a new trial granted.

MORSE, C. J., and LONG and GRANT, JJ., concurred.

MCGRATH, J. (*dissenting*). Plaintiff's intestate was killed by an east-bound passenger train while he was attempting to cross defendant's tracks with his team at a street running north and south at right angles with defendant's tracks 636 feet west of the station at Howell, known as "East Street." The accompanying diagram will indicate the surroundings.



Decedent was driving south at about four o'clock in the afternoon of Oct. 19, 1889. The pilot of the engine struck between the horses and the front wheels of the wagon, instantly killing Grostick and both horses. The defendant's right of way is filled in at this point from six to eight feet, and the highway approaches are about eighteen feet in width. The east-bound train emerged from a cut which is about eighteen feet deep at the point, E., about 1150 feet

west of East street. The westerly end of the cut is 3024 feet westerly from the station, and about 200 feet north of the station line, so that the train is upon a curve from the time it enters the cut until just before reaching East street. A number of witnesses testified that the train was eighteen minutes late at Fowlerville, and that the train was moving at a very high rate of speed. Those who do undertake to fix the rate give it as from twenty to forty-five miles an hour. The conductor says that they made the run from Fowlerville to Howell, eight and one-half miles, in thirteen minutes, and made up three minutes of lost time. Nineteen witnesses say that they heard the station whistle as the train approached. The engineer, fireman, and conductor say that the whistle was given at the entrance to the cut, 3024 feet west from the station. Of these witnesses, nine were at or near the station looking for and expecting the train, and several of them say that they saw the steam escape as the whistle was given. Seven of them, including the conductor, engineer, and fireman, were on the train. Five witnesses heard no whistle, and fifteen witnesses heard no crossing whistle and no bell, and the majority of them are positive that neither whistle nor bell was sounded. The fireman said that he supposed that the decedent was going to stop his team, but, noticing that he did not, he (witness) called out "Whoa!" to the engineer, who said that he reversed just as he struck the horses, and the train was stopped opposite the elevator. Several witnesses testified that they heard the roar of the train, and a number of others said that the train made no noise. One witness, who was on East street, thirty-five rods south of the track, says: "I was with Mrs. Ackley on that day. As we were coming in town, about thirty or thirty-five rods of the crossing, we saw a train coming; and we hadn't any more than said it when the train came and struck them. I did not hear any whistle or any bell. If there had been a whistle blown or a bell rung I think I could have heard it. The train came in very fast, and made no noise whatever. I would not have heard it if I hadn't seen it." Mrs. Ackley says: "Miss Carlton was with me, coming north. We were riding along leisurely and looked up, and saw the train coming. All we noticed we saw a team coming upon the railroad—a dark colored team—and the engine struck the team just as I saw the train. I did not hear any whistles nor any bell. I was about thirty rods south of the crossing, on the Pinckney road. If the whistles had been blown, it seems as if I could have heard it. My hearing is perfectly good. I can't give the exact time. It was between three and four. The train was coming, at the

time it struck the team, at a good speed. I was, I think, about thirty rods south of the planing mill. I looked up and saw the train coming. I heard no whistle and no noise of any kind. I didn't hear the roaring of the train at all. I heard nothing. We heard no whistle until after the gentleman was struck. After the horses were thrown over, they whistled and rung the bell; and we heard that, just before coming in the depot." At the rate of speed that the conductor stated that the train made between Fowlerville and Howell it would take the train about twenty seconds to make the distance between the mouth of the cut and East street. The testimony was that decedent had been driving at a "dog trot," but that the horses came to a walk before reaching the track. The horses were five and six years of age, and worth from $450 to $500; and the testimony is that they approached and entered upon the track as though they heard nothing. One witness, who was at the time of the collision north of decedent, on East street, said that decedent's back was towards the witness. Two witnesses say that when struck, and just before going on the track, decedent was looking east, as though expecting a train. One witness, who lived north of the track, on East street, but whose place of business was south of the track, on East street, said that on hearing the whistle, while approaching the track from the north, it was difficult to tell from which direction the train was approaching. There was no obstruction west of East street, on the north side; and when at Sutton's house, which is 126 feet from the tracks, the train could be seen as it emerged from the cut. But, coming south on East street there were obstructions—the Sutton house, the elevator, the engine house, and the station—which partially obstructed the view to the east after reaching Sutton's house until defendant's right of way was reached. Plaintiff had judgment, and defendant appeals; and it is urged that, as plaintiff could have seen the approaching train if he had but looked, consequently he is guilty of contributory negligence, and that the trial court should have directed a verdict for defendant.

Section 3375 of the statutes provides that "a bell of at least thirty pounds' weight, and a steam-whistle, shall be placed on each locomotive engine, and said whistle shall be twice sharply sounded at least forty rods before the crossing is reached, and after sounding of the whistle the bell shall be rung continuously until the crossing is passed, under a penalty of one hundred dollars for every neglect; provided, that at street crossings within the limits of incorporated cities or villages the sounding of the whistle may be omitted, unless required by the common council or board of trustees of such

city or village; and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect.

1. The rule is well established that to warrant the court, in any case, in instructing the jury that the plaintiff was guilty of negligence, the case must be so clear against him as to warrant no other inference. Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99; Mynning *v.* Detroit, L. & N. R. Co., 67 Mich. 677. As was said in Teipel *v.* Hilsendegen, 44 Mich. 462, "The judge takes the case from the jury when it is susceptible of but one just opinion." In Billings *v.* Breinig, 45 Mich. 65, Justice GRAVES, speaking of the showing as to the exercise of due care on the plaintiff's part, says: "But it was not required that this should be made out by direct evidence. If the occurrence itself and the surrounding circumstances, after due allowance for conflicting considerations, were capable of breeding an inference of it, and the jury might draw it, in the proper exercise of their function, it was sufficient." In the Carver Case, 61 Mich. 593, Justice CHAMPLIN says: "In determining the preliminary question of law, it is not the province of the court to pass upon the weight of the evidence, for the sufficiency and weight of evidence, and the effect to be given thereto, is a question exclusively for the jury; and it follows that it is only where there is no legal evidence which, if believed, will establish a fact material to the plaintiff's case, that the trial judge can take the case from the jury." In Harris *v.* Township of Clinton, 64 Mich. 452, CHAMPLIN, J., says: "Upon this issue there are two reasonable but different views which might be taken, and therefore the question should have been submitted to the jury." When a case is taken from the jury, it cannot be authorized unless upon the strongest case made by any of the witnesses. Courts cannot usurp the functions of the jury. The case must be absolutely free from conflict before it can be taken from the jury. Marcott's Case, 47 Mich. 7, 4 Am. & Eng. R. Cas. 548.

Question of negligence should have been left to jury.

In the Breckenfelder Case, 79 Mich. 563, Justice CHAMPLIN says: "The only negligence or want of care that can be imputed to him is that he did not look west, to see if cars were approaching, before stepping upon the track. Had he done so, he would have seen the box-cars coming, and so near that he could not get across safely. He was neither deaf nor blind, and was in possession of the ordinary faculties of mankind. He was familiar with railroads, and had crossed the road at Adams street for years. He had seen the train

pass west. It was passing him, going east as he was crossing from the west to the east side of Adams street, and had cleared the street as he had reached the sidewalk. Was it a natural conclusion, under such circumstances, for a man of ordinary prudence to form, that he might safely cross the track upon the sidewalk as soon as the receding train allowed him to do so, and he was justified, as a prudent man, to act upon such conclusion, without looking to see if there would be danger from other cars following closely after the receding train? * * * It was for the jury to say whether he took that care and caution, under all the circumstances which surrounded him, that a prudent man, exercising ordinary caution, should have exercised."

In the Little Case, 78 Mich. 207, Justice CAMPBELL says: "The car in question had a few minutes before gone down the west track, and being behind time, or for some other reason, passed at a much faster rate than usual. * * * He had also a right to expect that the cars would not be run in any unusual way or carelessly. * * * Defendant introduced no testimony at all; and, in order to convict plaintiff of negligence, it was necessary to assume that he must have heard what other unimpeached witnesses did not hear, or seen what they did not see. To assume, in the face of testimony to the contrary, that there were bells that made such a noise as should have given warning of their coming to all persons, or that the noises of the street must have no effect in deadening the noise of the car in its approach, is to go beyond the province of the court, and prevent the jury from passing on pertinent facts. That plaintiff took some precautions is shown affirmatively. It was for the jury to say whether, under all the circumstances, he was so remiss that failure to actually hear or see the car in its approach, so as to avoid it, is his own fault, so as to make him responsible for his own hurt."

In Detroit & M. R. Co. *v.* Van Steinburg, Justice COOLEY says: "In determining this question, we must look at the case as it appears from the plaintiff's own testimony, unqualified by any which was offered on the part of the defendants, and must concede to him anything which he could fairly claim upon that evidence. He had a right to ask the jury to believe the case as he presented it; and however improbable some portions of his testimony may appear to us, we cannot say that the jury might not have given it full credence. It is for them and not for the court to compare and weigh evidence. For the purpose of any positive instructions which one party may demand upon the evidence, he must concede all that his opponent may claim for it. He must therefore con-

cede in the present case that the train came in without sounding any other signal than the whistle which called the station; that it approached the station at a velocity which was unusual. * * * As a general rule, it cannot be doubted that the question of negligence is a question of fact, and not of law. * * * Negligence, as I understand it, consists in a want of reasonable care, which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury. The injury is therefore one which must take into consideration all these circumstances, and it must measure the prudence of the party's conduct by a standard of behavior likely to have been adopted by other persons of common prudence. The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility; for when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the occupations of society and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. The judge, it is said, in one case, is not bound to submit to a jury the propriety of a particular course, when it is perfectly notorious that all prudent men conduct their own affairs differently. The uniformity of the conduct of business men becomes a rule of law. * * * It is a mistake, therefore, to say, as is sometimes said, that, when the facts are undisputed, the question of negligence is necessarily one of law. This is generally true of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions have been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot

be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may well differ."

2. If the circumstances are such that reasonable minds might draw different conclusions respecting the fault of the injured party, the plaintiff is entitled to go to the jury upon the facts. Brezee *v.* Powers, 80 Mich. 182; Teipel *v.* Hilsendegen, *supra*; Roux *v.* Blodgett & D. Lumber Co., 85 Mich. 519; Swaboda's Case, 40 Mich. 424; Hagen *v.* Chicago, D. & C. G. T. J. R. Co., 86 Mich. 615; Adams *v.* Iron Cliffs Co., 78 Mich. 271; Luke *v.* Wheat Min. Co., 71 Mich. 364, Billings *v.* Breinig, *supra*; Van Steinburgh's Case, *supra*.

3. It is not necessary that the absence of contributory negligence should be shown beyond cavil or question. Teipel *v.* Hilsendegen, *supra*; Billings *v.* Breinig, *supra*.

4. Nor is it the law of this state that, under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways, and to listen for approaching trains. "It is generally required, but it is not a rule of universal application. Every case must depend upon its own circumstances; and it would be unreasonable to apply such rule under all circumstances, without regard to the condition of things at the time. He is only required to take such precaution as an ordinarily prudent men would under like circumstances, and whether or not he did use such care is generally a question for the jury." Cooper's Case, 66 Mich. 266, 306; Richmond's Case, 87 Mich. 374; Breckenfelder's Case, *supra*; Helbig's Case, 85 Mich. 359. The legal presumption is that a person killed at a railroad crossing did stop to look and listen, and will prevail, in the absence of direct testimony on the subject. Mynning *v.* Detroit, L. & N. R., 64 Mich. 93, 28 Am & Eng. R. Cas. 665. As was said in Johnson *v.* Hudson River R. Co., 20 N. Y. 65: "The natural instinct of self-preservation, in the case of a sober and prudent man, stands in the place of positive evidence."

Duty of traveler to look and listen.

5. As bearing upon the question of contributory negligence the right of one person to rely in some measure upon the assumption that another will do his duty has been repeatedly recognized by this court. Van Steinburgh's Case, 17 Mich. 99; Williams' Case, 31 Mich. 276; Miller's Case, 46 Mich. 532, 6 Am. & Eng. R. Cas. 89; Staal's Case, 57 Mich. 244; Dickinson's Case, 53 Mich. 47, 21 Am. & Eng. R. Cas. 456; Guggenheim's Case, 57 Mich. 488, 66 Mich. 157; Klanowski's Case, 57 Mich. 528, 21 Am. & Eng. R. Cas. 648; Harris' Case, 64 Mich. 447; Little's Case, 78 Mich. 207; Richmond's

Right of traveler to rely on company to do its duty.

Case, 87 Mich. 374; Kinney *v.* Folkerts, 78 Mich. 697, 84 Mich. 619.

In the Van Steinburg Case, Justice COOLEY says: "Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated, in view of what he had a right to expect from such other person; and he is not to be considered blamable if the injury has resulted from the action of another, which he could not reasonably have anticipated. * * *" In the Williams Case, Justice CAMPBELL says: "A passenger along the sidewalk of a public street has a right to expect some warning before any sudden movement of this kind, and there should be very plain proof of negligence to bind him, under such circumstances." In that case the track was a spur track, but in this the statute expressly provides that a warning be given. Again, in the Staal Case, Judge CAMPBELL says: "Whether the moving forward, as it was done, was culpably negligent, must depend on what Staal was bound to anticipate. In the absence of any knowledge of what was passing in his mind, we cannot hold him conclusively at fault unless there is no sensible explanation to the contrary reasonably possible. But he had a right to suppose that defendant would not violate any legal duty, and he could not be bound to suppose it would fail to take reasonable measures to prevent mischief; and he could not be censured if he acted as seemed proper at the time. The case could not be taken away from the jury, so as to prevent them from giving to either party the benefit of any inference which might be drawn from a comparison of all the facts. If they found him negligent, their verdict, perhaps, could not have been set aside as without support. But they have found otherwise, and we think they had enough before them to make their verdict legally sufficient."

Again, in the Harris Case, Justice CHAMPLIN says: "It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, * * * defendant is liable. * * * The fact that Sopher knew the location of the highway, that it was crooked, that there were no guides or barriers, that it was overflowed, and the water had raised since he last passed over it, and knew that some hazard was incurred in attempting to pass over it, did not conclusively show that it was negligence to make the attempt." Again, in the Marcott Case: "If the signals were not given, there was a distinct

violation of law, which we cannot, as matter of law, say had no effect on the result."

In the Guggenheim Case, referring to the testimony, Justice SHERWOOD says: "But the question presented is, does it not, standing alone and taken as true, show, or tend strongly to show, that the defendant was negligent in passing the crossing and coming round the curve, with its train off of time, at the rate of speed that it did, and without giving any of the signals or warnings whatever, required by statute, or otherwise? I think it does; and, if that is the correct conclusion, then I apprehend there can be no question but that the case should have been submitted to the jury. From the testimony above stated, it appears that the plaintiff had good reason to believe that no train was approaching, and that he could make the crossing in safety. Certain it was that, had the train been slowed down ten seconds, he would have passed the fatal spot in safety; and it is almost conclusively to be presumed from the facts stated that, had the whistle been sounded or the bell rung for the crossing, he could have done it without injury. The negligence of the defendant, which could not have reasonably been anticipated, should not be allowed to impose a degree of care and diligence upon the deceased unknown to the law, and which would not have been required if ordinary attention and prudence had been exercised by defendant. In the Guggenheim Case (second hearing), Justice MORSE says: "When the railroad company is required to sound an alarm, or is in the habit of blowing whistles and ringing bells, it seems to me that the traveler in the highway has a right to rely somewhat upon the observance of this custom or duty. * * *" He was not bound to look back and listen as carefully as he would have been had a train been due, and the time of its coming been known to him. This is good law. The precaution that Manheimer was bound by the law to take was the care that an ordinarily prudent man would exercise under like circumstances. The ordinarily prudent man looks and listens before he crosses a railroad track, but he does not look or watch as closely when he has reason to believe that no regular train is due or coming as he does when he knows that one may be expected at once at the crossing.

In the Klanowski Case, Justice SHERWOOD, referring to the statutory duties of the company, says: "Such duties cannot be neglected or omitted with impunity. If they are, and an injury to persons or property occurs by reason thereof at such places, the company will be liable; and although the party injured under such circumstances, by his acts or omissions to act, induced by the negligence of the

company, may be guilty of some faults which contributed to the injury complained of, such fault ought not to be permitted to avail the company in making defense against their wrongful acts, unless it was willful, or so gross as to render it equally inexcusable. Any other rule would allow the company to take advantage of its own wrong in avoiding its statutory liability. * * * Many times the train runs much stiller than at others, in consequence of the condition of the atmosphere, and other causes. In all cases, persons, except those in charge of the train, are liable to be deceived in the speed of the train; and in no case is the exact time when the engine reaches the crossing known to others than the engineer. For these and many other reasons which might be given, no other safe rule can be adopted. No less than the giving of every warning the law exacts should be held sufficient to shield the company from liability for damages arising from injuries received at such places. Safety to the lives of those traveling upon the cars, as well as to those traveling in vehicles upon the highway, requires this. All persons have a right to expect and rely upon the full performance by the company of all the requirements and duties imposed upon it by the law under which it alone is allowed to exist and do business; and it is not unfrequently impossible to ascertain with any degree of certainty how far the neglect of the company to give the required warnings at highway crossings may have been relied upon by a person in regulating and determining his action in approaching the track, where a collision and injury occurs, resulting in his immediate death. Usually the circumstances surrounding the accident have to be relied upon in determining the question, and such action on the part of the injured party should never, in this class of cases, be allowed to control the verdict of jurors, unless it satisfactorily appears to have been very gross, or wantonly negligent and careless."

In the Miller Case, Justice MARSTON says: "A stricter rule should not be held here than in criminal cases, where the right of one in apparent danger to act upon circumstances as they appear to him at the time is well settled; and, although subsequent investigation may show that he erred, yet that alone will not make him criminally responsible. If the neglect of the company to sound the whistle when approaching the highway permitted the plaintiff to drive into a dangerous position, under circumstances which allowed him no time for calm reflection, and he, acting upon the spur of the moment, in his efforts to avoid the danger, made a mistake, and took what subsequent, cool, deliberate investigation may show to have been wrong, and that some other

course would have been better, if not absolutely safe, yet he cannot be charged with contributory negligence because of such error of judgment, under such dangerous circumstances. This is the rule in both civil and criminal cases, sustained by an abundance of authority, if any, indeed, were needed."

In the Dickinson Case, COOLEY, J., says: "Plaintiff has a right to assume that the defendant would perform its duty in guarding the safety of its passengers and servants, and it is only because it has failed to do so in this instance that the danger was encountered." In the Little Case, Justice CAMPBELL says: "Plaintiff had also a right to expect that the cars would not be run in an unusual way or carelessly."

In the Richmond Case, MORSE, J., says "that plaintiff could have seen the approaching cars after he reached a point 20 feet from the crossing, and, if he had looked then he would have undoubtedly seen these cars in time to have stopped and avoided a collision. And it is pretty apparent —almost absolutely certain, from the plaintiff's own showing —that he did not look south within 20 feet until his horse was upon the track. Whether he was negligent depends in a great measure upon whether or not he had a right to rely, under the circumstances, upon the absence of the flagman, and the lack of any signal of danger from him." The court in that case was asked to instruct the jury that the absence of the flagman from his post did not in the least excuse plaintiff from exercising his senses, sight and hearing, to ascertain whether the train was approaching, and that if plaintiff, by looking up the track, could have seen the train, to avoid the injury, his omission to do so was such negligence as would prevent a recovery. This the court refused to do, but left it to the jury to determine whether, under the circumstances, plaintiff had a right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from such watchman, as an assurance of safety; and this court approved the course taken. In Kinney *v.* Folkerts this court said: "If defendant, by his own act, has thrown plaintiff off his guard, and given him reason to believe that no vigilance was needed, the lack of such vigilance is no bar to a recovery. If the statement of the plaintiff is a true one, he was thrown off his guard, and it was for the jury to say whether an ordinarily prudent man would have done as he did under like circumstances."

It was said in Engel *v.* Smith, 82 Mich. 1, that "it is a sound rule of law that it is not contributory negligence not to look out for danger where there is no reason to apprehend any."

In Thomas *v.* Delaware L. & W. R. Co., 8 Fed. Rep. 729, it was held that "it was correct to instruct the jury that plaintiff had a right to assume that the defendant would use more care, in view of the obstructed condition of the crossing, than ordinary. The law will never hold it imprudent in any one to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both." Citing Newson *v.* New York Cent. R. Co., 29 N. Y. 383; Liddy *v.* St. Louis R., 40 Mo. 507; Langhoff *v.* Milwaukee & P. R. Co., 19 Wis. 515; Hegan *v.* Eighth Ave. R. Co., 15 N. Y. 383; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60–72. The court say further: "But assuming that the deceased saw the approaching train 60 rods from the crossing, as he was preparing to cross it would have been error to instruct the jury, as requested, that he was guilty of contributory negligence if he did not stop to see if he could cross safely as he emerged upon the track from behind the empty car upon the side track. Kellogg *v.* New York Cent. & H. R. R. Co., 79 N. Y. 72. The jury were at liberty to find, if the train had been approaching at ordinary speed, there was ample time for the deceased to cross in safety, as the result proved; if the train had been running at 20 miles an hour instead of 40, indisputably there would have been ample time. It is not negligence *per se* to cross a track in front of an approaching train."

In Piper *v.* Chicago M. & St. P. R. Co., 77 Wis. 247, the court says; "There is evidence tending to prove that the train was from 15 to 20 minutes behind time. The conductor testified that he made a distance of 6 miles in 10 minutes, which would be 900 feet in 17 seconds. The particular conduct of the plaintiff, complained of, is his failure to look in the direction of the coming train after reaching a point within 50 feet of the crossing. He testified that he did look in that direction when between 50 and 60 feet of the crossing; and other testimony tends to prove that, from the point where he so looked, he could have seen the train, had it been within at least 900 feet. Assuming that testimony to be true, as we must, and it follows conclusively that while the plaintiff was passing over 50 or 60 feet, the train passed over at least 900 feet. This court has held, in effect, that where a traveler on a public street in a city approaches a railway crossing, and nothing appears to the contrary, he may properly assume that a train is moving at a lawful rate of speed, and, if it transpires that the rate of speed was unlawful, that fact may be taken into consideration in considering the question of contributory negligence. "It is claimed as a matter of law that the plaintiff was not

excusable, upon any theory, from omitting to look eastward along the track after getting within 50 feet of it, since every step of the team forward enabled him to see for a greater distance in the direction of the approaching train, and since his horses were perfectly gentle, and might have been stopped at any instant. But it is to be remembered that the plaintiff may have been lulled into a sense of security by thus failing to see the train when he did look. So that, under all the circumstances stated, we are unable to say, as a matter of law, that the momentary diversion of the plaintiff from looking in the direction of the coming train by reason of the conduct of his horses was not excusable." Butler *v.* Milwaukee & St. P. R. Co., 28 Wis. 487; Bower *v.* Chicago & M. St. P. R. Co., 61 Wis. 457, 19 Am. & Eng. R. Cas. 301; Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 152, 19 Am. & Eng. R. Cas. 285; Winstanley *v.* Chicago, M. & St. P. R. Co., 72 Wis. 375, 35 Am. & Eng. R. Cas. 370; Duame *v.* Chicago & N. W. R. Co., 72 Wis. 523, 35 Am. & Eng. R. Cas. 416; Kellogg *v.* New York Cent. & H. R. R. Co., 79 N. Y. 72.

In Allen *v.* Maine Cent. R. Co., 82 Me. 111, held, that plaintiff had a right to rely upon the trains approaching the crossing at a rate of speed not exceeding that allowed by law.

In Pennsylvania R. Co. *v.* Ogier, *supra*, the court said: "The theory that the deceased might have seen 623 feet along the railroad in the direction in which the train was approaching, from a point at which he might have stopped the progress of his horse, and escaped danger, but did not see it until within 174 feet of him, if considered abstractly, and entirely unshaken by any or every other consideration, would have presented a strong case of negligence; but even then it would scarcely have justified a court in saying there was negligence, as a matter of law, when but seventeen seconds were allowed for action to the party in danger."

In Jones *v.* East Tenn., V. & G. R. Co., 128 U. S. 443, Justice MILLER says: "On the other hand, there is some testimony to show that the plaintiff ran carelessly through the depot, that he knew the train was approaching, and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him. But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others. There is nothing in a case in which

it is conceded, fully and unreservedly, that the defendant company is in fault on account of the manner of running its trains, such as the high rate of speed and other careless matters mentioned by the court in its instructions, which should justify the court in refusing to submit to the jury the question whether the defendant company is relieved from the liability incurred by it, by reason of the acts of the plaintiff showing that, in some degree, he may not have been as careless as the most cautious and prudent man would have been. Instead of the course here pursued, a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

In Continental Improvement Co. *v.* Stead, 95 U. S. 167, the court says: "But as this was not a regular train, or on usual time, the same degree of caution would not be required on plaintiff's part, or such as if it were a regular train and on usual time." Referring to a request to charge, BRADLEY, J., says, "It states such duty with the rigidity of a statute, making no allowance for modifying circumstances, or for accidental diversion of the attention, to which the most prudent and careful are sometimes subject, and assuming, in effect, that the duty of avoiding collision lies wholly or nearly on one side. The right of precedence does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition."

In Parsons *v.* New York Cent. & H. R. R. Co. 113 N. Y. 364, after referring to the rule as to the exercise of care by persons crossing railway tracks, the court says: "But the duty of active vigilance must be adapted to the circumstances of the case; and if the offending company has by its own conduct, and by its published regulations, led the public to believe that trains would not be run on its tracks at specified times and places, persons having occasion to cross them have the right to rely on the assurance of the company, and are not necessarily guilty of negligence when injured by prohibited trains while doing so. The deceased was justified in supposing that no rapidly moving train would come into the station while he remained in the yard, and was engaged in communicating with his friends on the west side. He had frequently done so before, and had been lulled into a sense of security by the immunity which he had

before enjoyed, and the reliance which he placed upon the care exacted of its servants by the railroad company. * * * Having once looked, and seeing no train, he had a right to assume that none would be coming at such a rate of speed as would preclude him from crossing a single track. It is probably true that, if he had looked both ways at the moment of stepping upon the track, he could have seen the approaching train; but that might be said of almost every accident of a similar character, and is a degree of vigilance seldom adopted by any one, and would require the impossible feat of looking in opposite directions at the same time, or anticipating the point from which he was to be assailed. The law does not require this; neither is there any rule which will defeat a recovery in cases of this kind merely because it was possible for an injured person to discover an approaching train. The law does not forbid persons from crossing railroad tracks, or impose upon them exclusive responsibility for damages incurred in making such an attempt. The question is whether the injured party, under all of the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercised under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact for the jury."

In Weber *v.* New York Cent. & H. R. R. Co., 58 N. Y. 451, the conrt held that, while the vigilance and caution required of the traveler must be proportioned to the unknown danger, it is also, in a measure, limited by the usual and ordinary signals and evidences of danger. In Voak *v.* Northern Cent. R. Co., 75 N. Y. 320, held, that if plaintiff was lured on by the failure of the company to give warning, without fault on her part, to a place of danger, she was entitled to recover.

In French *v.* Taunton Branch R. Co., 116 Mass. 537, as plaintiff approached the crossing, a freight train was passing; and, after the last car passed, she attempted to cross. She was driving with care, and watching the road. She heard no signal, received no warning that other cars were coming, and saw no flagman. At a point forty-six feet from the center of the track, she could have seen up the track forty-six feet; and at a point thirty feet away she could have seen a long distance. She did not look in that direction when she reached these points, and gave as a reason that she did not suppose that one train would follow another so closely. The court say: "Whether plaintiff was in the exercise of that due care which persons of common

prudence and intelligence would exercise when placed in a similar situation, and whether she was careless in failing to look up the tracks at the point near the crossing where it was visible, was a question for the jury." Citing Wheelock *v.* Boston & A. R., 105 Mass. 203; Allyn *v.* Boston & A. R., *Id.* 77; Chaffee *v.* Boston & L. R., 104 Mass. 108.

The circumstances referred to in all of the railroad crossing cases cited are the absence of warning, the unusual rate of speed, and the fact that the train was behind time. These are considerations which must of necessity enter into the determination of the question of negligence. As it is said by CAMPBELL, J., in Strand *v.* Chicago & W. M. R. Co., 64 Mich. 219, 28 Am. & Eng. R. Cas. 213: "The conduct of a person under such circumstances cannot be severed from the circumstances themselves." In the present case there was a combination of all of these circumstances, and, in addition, the highway was within 636 feet of a station. In the Apsey Case, 83 Mich. 432, deceased saw the train approaching, and whipped up his horses to get across the track. The same is true in the Underhill Case, 81 Mich. 43. The Guta Case, 81 Mich. 291, and the Pzolla Case, 54 Mich. 273, 19 Am. & Eng. R. Cas. 334, arose within the limits of a city, where whistle blowing was prohibited. In the former case, plaintiff saw an engine side tracked for the purpose of allowing another train to pass; and in the latter the proofs show that the plaintiff was looking in the direction of the train, and deliberately walked upon the track, in the face of it. In the Matta Case, 69 Mich. 109, 32 Am. & Eng. R. Cas. 71, and in the Mynning Case, 67 Mich. 677, the parties approached the track with their heads down, utterly indifferent as to their surroundings. In the Freeman Case, 74 Mich. 86, 37 Am. & Eng. R. Cas. 501, the parties were intoxicated. In the Brady Case, 81 Mich. 616, the view was obstructed so that plaintiff could not see the approach of a train until within twenty feet of the track. The train was due and plaintiff knew it. One of his horses objected to crossing, and he urged the horse across. The Gebhard Case, 79 Mich. 586, arose within the city of Detroit. It does not differ from the Breckenfelder Case, except perhaps in the ample knowledge which Gebhard possessed of the use of the tracks. In the Potter Case, 62 Mich. 22, the track for some forty or fifty rods was in plain sight. There was no showing of unusual speed, but the blowing of the whistle started plaintiff's horses. Plaintiff made no effort to check them, but attempted to get across the track before the engine reached him. The Rhoades Case, 58 Mich. 263, 21 Am. & Eng. R. Cas. 659, was a similar case. In the Haas Case, 47 Mich. 401, 8 Am. & Eng. R. Cas.

268, the court found that the crossing signals were in fact given. There was no claim that the train was late or was running at any unusual rate of speed. The Kwiotkowski Case, 70 Mich. 549, arose within the city limits. The only negligence charged was the high speed of the train. Deceased was on foot. It was at night. The head-light of the train lighted the track for at least a block. The court in that case say there was nothing to distract or confuse his vision.

In the recent case of Cahill *v.* Cincinnati, N. O. & T. P. R. Co. (Ky.), 18 S. W. Rep. 2, the railroad track was, for a considerable distance south of the crossing, straight, and, in the opinion of some witnesses, a train coming from that direction could be seen 400 yards away from a point on the roadway 100 feet from the crossing. But the train was a passenger train, behind time, and running at a high rate of speed. Whether plaintiff, before going on the track, looked or listened for a coming train, does not appear. The plaintiff was upon a private crossing, near a public crossing. Speaking in respect to persons on such private crossing, the court say: "And so they have the right to act upon the presumption the company will duly comply with every legal requirement that may affect them in the reasonable use of such crossing. Therefore, if a person of common prudence and intelligence who distinctly and habitually hears signals of approach of railroad trains to a public crossing, that he knows it is both the duty and custom of the company to give, would ordinarily rely on such signals in the use of his own private crossing, then he should, in law as well as in fact, have the benefit of them; otherwise his would be the case of a person injured while in the reasonable exercise of a legal right, yet without remedy against the wrong-doer or person in fault. As a matter of fact within common observation, persons living in the vicinity of a railroad generally keep informed about regular movement of trains, and those of them near enough to hear the customary sound of the steam-whistle for a public crossing do rely upon it as a signal by which to regulate use of their own private passway over it, and we see no reason why they may not rightfully and prudently do so; for nothing more is thereby exacted or assumed by them than simple performance by the railroad company of a legal duty already prescribed for safety of those using the public crossing that incidentally and naturally operates for their own. And when the legal obligation is coupled with customary performance of the duty of giving such signals, a double assurance is afforded that all who hear may rely on them; and in fact they are as implicitly, and may be as certainly and

safely, relied on, by those hearing them, at a private as at the public crossing for which they are given. To so allure a person to go on the railroad track at his private crossing, and then exempt the company from liability for injuring or killing him, upon the fallacious and deceptive theory that, in legal contemplation, signals, though inevitably heard beyond, are for the sole benefit of those at a public crossing, would be without reason and justice. The law sets no such bounds to the liability of a person violating it, nor does it thus curtail the remedy of one injured by the violation. * * * It is not contended the plaintiff was negligent in any respect, except failing to look for a coming train before going upon the railroad. Whether either she or Henry Conrad did so look could not, for the reason before indicated, be shown by direct testimony. Therefore, it was the peculiar province of the jury, not of the court, to determine that question from facts and circumstances proved; for, whatever may be the rule elsewhere, it has been definitely settled by this court that it is not to be presumed, in the absence of evidence as to the care exercised by a person injured or killed on a railroad where he had the right to be, that he recklessly or carelessly imperilled his own life. * * * But to decide that failure of a person to look along a railroad before attempting to cross it is, under all circumstances and necessarily, negligence, would be arbitrary and without reason; for there may be evidence sufficient to satisfy a person of ordinary carefulness the track is clear, without taking that precaution, as when he knows it is not usual train time, and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, cannot, upon principle, be regarded as negligent, even if he does fall short of the measure of vigilance needed to prevent being injured by a passenger train running hours behind time, at an extraordinary rate of speed, and without any signal of its approach."

In Studley *v.* St. Paul & D. R. Co. (Minn.), 51 N. W. Rep. 115, plaintiff was on foot. She died from the injuries received. The presumption as to the exercise of reasonable care was removed by affirmative proof that she turned her head, and looked towards the train as it approached, in ample time to avoid the danger; and, too, the court say that it would seem quite certain that plaintiff must have been overtaken while between the crossings and a trespasser upon defendant's right of way, and that as to whether the bell was rung or the whistle sounded "the preponderance of the evidence was decidedly with the defendant." In Carney *v.* Chicago, St. P., M. & O. R., 46 Minn. 220, plaintiff went to

the depot "for the purpose of meeting the incoming train." In Clark *v.* Northern Pac. R. Co. (Minn.) 50 N. W. Rep., 365, plaintiff expected the train, and walked upon the track, notwithstanding his view was obstructed, until he reached a point six feet therefrom.

In the present case, in order to determine whether Grostick was negligent, several questions must be answered. This highway was but 636 feet west of Howell station. There were three highway crossings within a space of 350 feet. The train was behind time. How much behind time? Did Grostick know that this train had not passed? The presumption is that he did not. The train was running at an unusual rate of speed. The steam had been cut off at the cut. The train was on a down grade of thirty-seven feet to the mile. The brakes had not been applied. It had the momentum of a train which had, according to defendant's testimony, made up 3 minutes in 8¼ miles. What was the rate of speed at which it was running? How many seconds had elapsed after the train had left the cut, before it reached East street—15 or 17 or 20? Perhaps less than either. How far was Grostick from the track when the train left the cut—20 or 25 or 40 or 50 feet? Was the station whistle given? Did Grostick hear it? If so, from which direction did he expect the train? Had he looked to the west 15 or 17 or 20 seconds before the collision, and seen no train; and then, the view to the east being obstructed by elevator, engine-house and depot—the engine-house and station being but from twelve to fifteen feet north of the track—had he become anxious, and turned his attention specially to the east? Would not the very fact of obstructions of the view to the east distract his attention from the west? Would not an ordinarily prudent man have expected that some warning would be given before a train from the west would come down upon him? Is it fair to measure Grostick's conduct by the knowledge possessed by those who expected the train, who knew that it was late, who saw the smoke of the steam-whistle? We must measure the prudence of plaintiff's conduct by a standard of behavior likely to have been adopted by other persons of common prudence. The very fact that in the presence of all of these men at the station, and of these witnesses, some of them but 100 feet from the place of collision, no one raised a hand or gave other warning, bears upon the question of the time which elapsed after the train came in sight and before the collision. And, too, the conduct of the horses bears upon the question of the sudden approach of this train. Was Grostick bound to anticipate that this train would come when it came, at this rate of speed, and without warning? There is no

testimony tending to show that Grostick was not a prudent and careful man, nor is it claimed or intimated by any one that he was not at the time in the possession of all of his faculties. Indeed, the testimony of one witness, who saw him from the north, is that he was looking towards the track; and two other witnesses who saw him as he drove upon the track, say that he was looking east, as though expecting a train from that direction. Here is positive, affirmative, and uncontradicted testimony as to carefulness. Had he been looking west, and been struck by a train from the east, the same charge would be made. Is this affirmative testimony to be overcome by an inference predicated upon a surmise or upon facts, the force of which is materially affected by surrounding and attendant circumstances and distracting conditions? If this train had not been behind time, Grostick would not have been injured. If it had not been running at an unusual rate of speed, Grostick would have crossed in safety. If it had given an alarm, Grostick would not, in all human probability, have attempted to cross.

The rules laid down in the cases cited have been formulated in recognition of the fact that prudent men do rely upon the performance by railroad companies of the duties imposed by statute. As was said in the Marcott Case, in the Guggenheim Case, and in the Klanowski Case, "if the signals were not given, there was a distinct violation of law, which we cannot, as matter of law, say had no effect upon the result." A saw mill is a place of danger, yet one entering upon employment therein may assume that the employer has done his duty respecting proper appliances and the good order of the machinery. If the rule and custom is to blow the whistle before starting the machinery, he may rely upon the observance of that rule. An elevator is a place of danger, yet one entering it may assume that the proprietor has done his duty. An engineer, upon entering his cab, has a right to assume that bell and whistle have been provided and are in good order. A railroad track cannot be said to be always a place of peril. A traveler crossing the tracks upon a highway is not there by invitation, but is there as a matter of right. The company has no exclusive right over the highway. Its right to precedence depends upon compliance with statutory provision. The ordinary highway is a place of danger, but the butcher's boy or the hackman cannot increase the peril, and then excuse his indifference to the rights of travelers on foot by setting up their failure to take extraordinary care in view of the fact that the butcher's boy or hackman usually drive through our streets as though pedestrians had no rights. The stand-

ard of care required of persons unlawfully upon a highway ought not to be elevated, in view of possible perils occasioned by unlawful use of such highway, or to excuse those making such unlawful use. The legislature imposes the duty of warning upon railway companies to protect the public. This duty is created by a public need. The statute cannot be said to be for the protection of careless people only. It presumes danger, in the absence of signals, to persons exercising ordinary care. This duty is imposed because of the standard of behavior that exists, and if a higher standard is required than that which gave rise to the statute the statute is a dead letter, and may be violated with impunity. To lay down the arbitrary rule that persons crossing a railway track must look and listen in all cases where it appears that, if such persons had looked, they would have seen the train, or there can be no recovery, would be to make the question of what is reasonable care in a given instance depend, not upon whether it was that ordinarily observed by prudent men under like circumstances, but upon a judicial enactment fixing a standard of care predicated upon the opinion of the court as to what ordinarily prudent persons ought to do, rather than upon what they actually do. In this class of cases, to enable the court to say as a matter of law that the plaintiff was guilty of contributory negligence, there must be but one exclusive inference from the facts shown. In the case of Parsons *v.* New York Cent. & H. R. R. Co., *supra*, the court say: "The question is whether the injured party, under all the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact for the jury." In other words, before the court is warranted in taking the case from the jury, the conduct of plaintiff must appear to have been palpably inexcusable. It must have about it the elements of recklessness or disregard of consequences. There was no error in the refusal of the court to take this question from the jury.

The case, however, must be reversed upon other grounds. The court instructed the jury that "if you find from the evidence that he did listen and look, and had no notice by sight or hearing, and if you find that no whistle was twice sounded, no bell rung, and that he had no notice by sound of rumbling train, or smoke, and ventured to cross, and that, while crossing, his danger was seen or known by the

Errors in the instructions.

employes of the defendant at a sufficient distance from the road crossing to enable them to slacken the speed of the train, or even to stop it, and that was not done, that would be gross negligence on the part of defendant in running its train, and it would not thereby be excused from liability." "It would be gross negligence on the part of the engineer, if he saw the deceased approaching the said crossing on the said highway, not to have sounded the whistle or rung the bell, and not to have slackened the speed of his train, and done everything in his power to avoid the collision, after seeing the said Grostick, if you find he saw him, and if he could have slackened the speed of the train and have avoided the accident."

The declaration does not charge defendant with gross negligence, or that plaintiff was seen or his danger known to defendant's employes, or that, knowing or seeing plaintiff's danger, they wantonly neglected to blow the whisle or stop the train. The court further charged "that, under the general statutes of this state, it is the duty of every railroad corporation owning and operating a railroad in the state to comply with the provisions of law as enacted by the legislature; that in constructing and making its road-bed and track over, and across the public highway, (which highway is then and there in use by the public as such,) to restore the highway to its former condition as nearly as possible, and to construct and maintain thereafter reasonable, suitable, and safe crossing for the passage of persons and teams traveling along the highway, over and upon said crossing." "And the further fact that the road-bed and track of defendant's said road was about seven feet above the level of the said highway and the natural earth surface of the surrounding lands may also be considered by you in determining the nature and character of the said highway crossing, and the degree of skill, care, and diligence and precaution thereby imposed upon the defendants in consequence thereof." "And the said surrounding circumstances of the said highway crossing imposed upon the engineer and fireman then and there in charge of the defendant's said engine a greater degree of care in regulating the speed of said train in approaching and crossing the said highway, and in keeping a careful and continuous watch from the lookout upon the cab of said engine, for the approach of teams and vehicles approaching the said crossing, upon, over, and along the said highway, than if the said highway had been an ordinary highway crossing." There was no testimony tending to show that the highway at this crossing had not been restored to its former condition, as nearly as possible, or that the defend-

ant had failed to construct and maintain a reasonably suitable and safe crossing at this point, nor was the neglect to keep a careful and continuous watch from the lookout upon the cab set out in the declaration. The road-bed of the highway had been raised to the level of defendant's road-bed, and the approach was gradual. There was no claim made that the width of the road-bed of the highway had anything to do with the accident, or furnished a reason why plaintiff should hasten to cross. These instructions were clearly erroneous, and the judgment should be reversed, and a new trial had, with costs to defendant.

Injury at Crossing—Duty of Traveler to Look and Listen—Effect of Negligence of Company.—See generally Beyel *v.* Newport News & M. V. R. Co. (W. Va.), 45 Am. & Eng. R. Cas. 188, and cases cited in note 196, *et seq.*, Cleveland C. C. & I. R. Co. *v.* Harrington, *post*; Richmond *v.* Chicago & W. M. R. Co., and note, *post*; Gratiot *v.* Missouri Pac. R.Co., *post*; Marks *v.* Petersburg R. Co., *post*; Louisville & M. R. Co. *v.* Webb, *post*.

CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS R. Co.

v.

HARRINGTON.

(*Indiana Supreme Court, February 6, 1892.*)

Injury at Crossing—Contributory Negligence—Questions of Law and Fact.—In actions for injuries at railroad crossings, where the facts and circumstances are not controverted, and the inferences therefrom are not equivocal and can lead to but one conclusion, the court should determine, as a matter of law, whether the party injured was guilty of contributory negligence; but where different inferences are warranted from the facts, and impartial and reasonable men might draw different conclusions, the court should leave the question to the jury under proper instructions. Under the facts and circumstances of this case, the court did not err in leaving the question of plaintiff's contributory negligence, in failing to take proper precautions before going on the track, to the jury.

Right of Traveler to Rely on Observance of Ordinance Regulating Speed of Trains.—One about to cross a railroad track has a right to presume that the railroad company will obey a city ordinance regulating the speed of trains; and while the wrongful conduct of the company in violating such ordinance and running its trains at excessive speed will not excuse the traveler from the exercise of reasonable care, yet, in determining whether he used reasonable care, his conduct is to be judged in the light of such presumption.

Point at which Traveler is Bound to Look and Listen.—The courts cannot fix any exact point as the point of danger at which a traveler on a highway is bound to look and listen for approaching trains upon a railroad track. All the law requires is ordinary care, and this must be determined by the circumstances of each case.

Ordinance Limiting Rate of Speed—Reasonableness.—Where a statute confers upon a city the power to pass an ordinance limiting the speed of trains within the city to four miles an hour, such an ordinance cannot be adjudged unreasonable and void.

Same—Charter Giving Company Power to Regulate Speed.—The fact that the charter of a railroad company gives it the power to regulate the speed of its trains, does not exempt it from the restriction imposed by an ordinance limiting the speed of trains. The exercise of the police power by the state cannot be restricted by such charter grants.

Same—Abandonment of Ordinance.— The fact that a railroad company has not been prosecuted for repeated violations of a city ordinance limiting the speed of trains, does not tend to prove that such ordinance has been abandoned and has become obsolete, and constitutes no defense to an action against such company for injuries caused by its negligence in running its trains at excessive speed.

APPEAL from Marion Superior Court.

Action to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals.

H. H. Poppleton, *A. C. Harris*, *W. H. Calkins*, and *John T. Dye*, for appellant.

B. Harrison, *W. H. H. Miller*, and *Winter & Elam*, for appellee.

COFFEY, J.—This was an action by the appellee, in the Marion superior court, against the appellant, to recover damages occasioned by a personal injury. The injury on account of which damages are claimed occurred in the city of Indianapolis, at a point where the appellant's railroad tracks cross Ohio street. The complaint alleges, substantially, among other things, that the train which inflicted the injury for which suit was brought was negligently run at a high and dangerous rate of speed, in violation of a city ordinance, and without ringing the bell. It also contains the usual allegation that the appellee was without fault or negligence on her part. A trial of the cause at special term of the superior court resulted in a verdict for appellee, upon which the court rendered judgment over a motion for a new trial. Upon appeal to the general term the judgment at special term was affirmed, from which this appeal is prosecuted. It is insisted here that the judgment of the superior court should be reversed, because—*First*, the undisputed facts in the case do not prove that the appellee was without negligence on her part; *second*, the instructions given by the court do not state the law of the case properly or correctly; *third*, the court erred in refusing to permit the appellant to prove that the ordinance of the city of Indianapolis regulating the speed of trains within the corporate limits of the city was unreasonable and void. The facts in the case necessary to understand the questions presented for

Facts.

our decision are substantially as follows: Ohio street, in the city of Indianapolis, runs east and west, is 60 feet wide, and at the point where the accident in question occurred has an improved roadway in the center and sidewalks on either side. It is much traveled both by persons on foot and in vehicles. The appellant's railroad crosses it at an acute angle, its course being from northeast to southwest. North of Ohio street the railway track curves towards the north, there being two or more curves, varying in degree, until it finally takes an almost due north course, until it reaches what is known as the "Massachusetts Avenue Station." Southwest of the Ohio street crossing, and in the direction of the Union station, the railway track curves towards the west until it attains an almost due west course at the station. Very much of this curvature occurs in the immediate vicinity of the Ohio street crossing. At the point where the accident occurred there are four railway tracks crossing Ohio street, near together, and substantially parallel with each other. In traveling west on Ohio street the first track reached at the crossing is known as the "Indiana, Bloomington & Western Railway track." This track at the time of the accident was owned and used exclusively by the Indiana, Bloomington & Western Railway Company. The track immediately west of this was used by the appellant and other railroad companies, and was known as the "down main," being the main track by which trains passed from Massachusetts Avenue station to the Union station. The track next immediately west was called the "up main," being used by the appellant and other railroad companies in running trains from the Union station to Massachusetts Avenue station. The next was a siding owned by the appellant, and constituted the westerly track of the group. Just south of Ohio street is a short siding connecting the "up main" with the "down main." A short distance east of this group of tracks, a small stream, known as "Pogue's Run," crosses Ohio street, and for some distance northeast of the street the general course of the stream is parallel with the railroad above described, and not far from it. On this side of the railroad tracks there are but few buildings near them. In walking west, on Ohio street, when at a point near the bridge over Pogue's run, the traveler has a comparatively unobstructed view of the railroad tracks to the northwest. The view in this direction, after passing a structure known as "Branham's Coal-Yard," near Pogue run's bridge, has no obstruction until after the tracks are passed. At the time of the accident the south side of Ohio street, as well as the whole region between the railroad tracks and Pogue's run,

in the direction of the Union station, was well covered with buildings and other structures. On the south side of this street, and abutting immediately upon it, there was a large lumberyard, inclosed by a high, tight fence, which, with other structures, occupied the space west of Pine street, running north and south, to a point about eight feet east of the Indiana, Bloomington & Western track. At the time of the injury of which complaint is made the appellee was about 40 years of age, in good health, with the senses of sight and hearing unimpaired. On the morning of the 13th day of April, 1886, about 7 o'clock, she started from her home, east of the Ohio-street crossing, to market, and walked west on the south side of Ohio street at a moderate gait. The morning was bright, and no wind was blowing. As she approached the railway crossing, a freight train composed of from 10 to 15 cars, with engine and caboose attached, was moving north on the "up main" at the speed of about 4 miles an hour, the rear of the train being near the crossing at the time she reached it. The train was making the noise usually made by moving trains; the engine was ringing the bell, and the steam was escaping from the dome. The noise made by this train was such as to render it difficult, if not impossible, to hear or to distinguish the noise of other approaching trains. The appellee, when 80 or 90 feet east of the "down main," could see north up the track at a distance of 800 feet. At that point she looked, and saw no approaching train. When at the east side of the first track, which is 37 feet west of the "down main," she was able to see north up the track for a distance of 400 feet. She again looked, and saw no approaching train. She then crossed the first track, and turned her attention to the southwest to look for approaching trains from that direction, but as she attempted to cross the "down main" one of the appellant's engines, approaching from the north, struck her, inflicting serious injuries. The engine which collided with her was drawing a passenger train, and was running at the speed of 18 or 20 miles an hour on the "down main," and was not ringing the bell. At the time of the accident there was an ordinance of the city of Indianapolis in force, which prohibited the running of engines, within the corporate limits of the city, at a greater rate of speed than four miles an hour. The appellee was familiar with the crossing, having passed over it frequently.

It is contended by the appellant that these facts and circumstances make a case in which the court is bound to adjudge, as matter of law, that the appellee was guilty of such contributory negligence as precludes her from recov-

ering in this action; while, on the other hand, it is contended by the appellee that they make a case where the question of contributory neglignce should be left to the jury, under proper instructions from the court. It is not disputed or denied that the facts make such a case of negligence on the part of the appellant's employes as renders the appellant liable for the injury to the appellee for which she sues, provided she was not guilty of any negligence which contributed to the injury. The duty of a traveler approaching a point on a public highway, where a railroad track is crossed upon the same level, has been so often declared by the courts in adjudicated cases, and is so well settled and understood by the profession, that it needs no further elaboration. All that is necessary to do here is to refer to some of the cases in which that duty is discussed and defined, and by so doing avoid incumbering this opinion with useless repetition. Ohio & M. R. Co. *v.* Hill, 117 Ind. 56; Baltimore & O. & C. R. Co. *v.* Walborn, 127 Ind. 142; Mann *v.* Belt R. & Stock Yard Co., 128 Ind. 138.

Question of contributory negligence for jury.

Where one approaching a railroad crossing of the kind above indicated is injured, and the facts and circumstances are not controverted, and the inferences from such facts and circumstances are unequivocal, and can lead to but one conclusion, the court will declare, as matter of law, whether the party injured was or was not guilty of contributory negligence; but in practice it often occurs that the facts and circumstances surrounding a particular case are such as to warrant different inferences, so that one impartial, sensible man may draw the inference and conclusion that the injured party was guilty of negligence, while another man equally impartial and sensible might draw a different conclusion; and in such cases the courts will not adjudge the question of negligence, but will leave it to the jury, under proper instructions. Baltimore & O. & C. R. Co. *v.* Walborn, *supra*; Mann *v.* Belt R. & Stock Yard Co., *supra*.

The question with which we are confronted is as to which of these classes the case under consideration belongs. It cannot be said that the appellee exercised no care to avoid the collision described in the complaint. It is evident from the fact and circumstances above set forth that very few seconds intervened between the time she looked north for approaching trains and the time at which she was struck. Of course, it was her duty to look south as well as north, and while doing so, and attempting to cross the tracks, she was struck by an engine approaching from the north, which was not in sight a few seconds before. Had the engine which

collided with her been run at the speed fixed by the city ordinance above mentioned it is quite probable that she would have crossed the appellant's railroad tracks in safety. While the general rule is that trains may be run at a very high rate of speed without the imputation of negligence, it must be apparent to every one upon a moment's reflection that populous cities constitute an exception to the rule, by reason of the great danger to life and limb. Philadelphia & R. R. Co. *v.* Long, 75 Pa. St. 257; Whart. Neg. § 803; Loucks *v.* Chicago, M. & St. P. R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305.

In the absence of some evidence to the contrary, we think the appellee had the right to presume that the appellant would obey the city ordinance, and would not run its trains at a greater rate of speed than four miles an hour at the point where the injury occurred; and, while the wrongful conduct of the appellant in this regard would not excuse her from the exercise of reasonable care, yet in determining whether she did use such care her conduct is to be judged in the light of such presumption. If, when she looked to the north 400 feet and saw no train, she knew that she could cross the tracks in safety before a train could reach her from that direction, it would be a harsh rule which would adjudge her guilty of negligence because she was struck by a train moving nearly five times as fast as the speed fixed by the ordinance of the city which she had a right to presume the appellant would obey. Chicago & E. I. R. Co. *v.* Boggs, 101 Ind. 522, 23 Am. & Eng. R. Cas. 282; Cincinnati, C. & St. L. R. Co. *v.* Yundt, 78 Ind. 373, 3 Am. & Eng. R. Cas. 502; Ohio & M. R. Co. *v.* Collarn, 73 Ind. 272, 5 Am. & Eng. R. Cas. 554; Pittsburg, C. & St. L. R. Co. *v.* Martin, 82 Ind. 483, 8 Am. & Eng. R. Cas. 253; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 71; Kennayde *v.* Pacific R. Co., 45 Mo. 261; Tabor *v.* Missouri Valley R. Co., 46 Mo. 353; Chaffee *v.* Boston & L. R.Co., 104 Mass. 108; French *v.* Taunton Branch R., 116 Mass. 537; Howland *v.* Union St. R. Co., 150 Mass. 86; Piper *v.* Chicago, M. & St. P. R. Co., 77 Wis. 247; Laverenz *v.* Chicago, R. I. & P. R. Co., 56 Iowa 689, 6 Am. & Eng. R. Cas. 274; Schmidt *v.* Burlington, C. R. & N. R. Co., 75 Iowa 606. In our opinion the decided weight of authority is that, under the facts and circumstances in this case, the question of contributory negligence was a question for the jury, under proper instructions from the court. Baltimore & O. & C. R. Co. *v.* Walborn, *supra*; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 39 N. Y. 68; Greany *v.* Long Island R. Co., 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473; McKee *v.* Bidwell, 74

Traveler's right to rely on lawful speed.

Pa. St. 223; Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 122; Ireland *v.* Oswego, H. & S. Plank Road Co., 13 N. Y. 533; Central R. Co. *v.* Moore, 24 N. J. Law 832; Barbo *v.* Bassett, 35 Min. 485; Chicago & E. I. R. Co. *v.* O'Connor, 119 Ill. 586, 2 Thomp. Trials, § 1663; City of Michigan City *v.* Boeckling, 122 Ind. 39.

Instructions considered.

The instructions in this cause are full, covering every phase of the case, and bear evidence of careful study and preparation. They cover all the instructions asked by the appellant, in so far, in our opinion, as the instructions asked contain a correct statement of the law. Some of the instructions asked, as well as some of those given by the court, however, require a more particular notice in this opinion. The appellant in several instructions asked the court to instruct the jury in effect that, if the appellant did not look for approaching trains when she was within ninety feet of the track upon which she was injured, or within thirty-seven feet or twenty-five feet, or just before she entered upon the track, she was guilty of contributory negligence, and could not recover. The court refused to give these instructions, and instructed the jury as follows: "I cannot say, as a matter of law in this case, at what particular place or distance from said railroad track, or at what point, it was her duty to look either way or to listen; but it would not be sufficient to look and listen only away from the presence of danger, but before placing herself in peril she was bound to listen and look for coming trains of cars that might come from either way; and if she did not so look and listen, and if doing so would have been available for safety, or if she was not otherwise in the exercise of ordinary care, as I have defined it to be, she cannot recover in this action," etc. In this ruling we are of the opinion that the court did not err. Under the facts and circumstances in this case we do not think any exact point could be fixed as the point of danger, at which the appellee was bound to look and listen. If she failed to look at the distance of ninety feet from the track, but did look at the distance of eighty-nine feet, or if she failed to look at a distance of thirty-seven feet from the track, but did look at a distance of thirty-five feet, or if she looked when within five feet of the track, and saw no approaching train, but did not look at the moment she was stepping upon the track, we do not think it could be plausibly contended that she was guilty of contributory negligence, because she did not look at the precise points indicated in the instructions asked. What the law requires, and all it does require, is that a person approaching a railroad crossing upon a public highway

shall use ordinary care to avoid injury. As to what constitutes ordinary care in such cases, as we have already said, is fully defined and settled by the authorities to which we have referred.

The appellant also complains that the court, in its instructions to the jury upon the subject of the duty of the appellee in approaching the crossing at which she was injured, was not sufficiently specific, and should have employed the terms used in the instructions asked by the appellant. We do not think this objection is well taken. It is well settled that, if the substance of an instruction asked is given by the court of its own motion, in its own language, there is no available error in refusing to give the instruction as asked. Town of Martinsville *v.* Shirley, 84 Ind. 546; Everson *v.* Seller, 105 Ind. 266; Sherman *v.* Hogland, 73 Ind. 472. We have carefully examined all the instructions given by the court in this case, as well as all those asked by the appellant and refused by the court, and we do not think there was any error committed in giving or refusing instructions.

Validity of ordinance regulating speed.

On the trial of the cause the appellee introduced in evidence an ordinance of the city of Indianapolis limiting the speed of engines and trains within the corporate limits of his city to four miles an hour. The appellant offered to prove—*First*, that four miles an hour was an unreasonable rate of speed at the place where the accident occurred, and that the ordinance was, for that reason, void; *second*, that by the terms of the appellant's charter it was not subject to the restrictions imposed by the ordinance, the charter giving the appellant the power to regulate the time and manner which cars and railroad vehicles, travel, and property should pass over its road; *third*, that by common consent the officers and citizens of the city of Indianapolis had never enforced the ordinance, although the same had been frequently violated, and that by reason of that fact the ordinance had lapsed by common consent, and had become obsolete.

The case of Coal Float *v.* City of Jeffersonville, 112 Ind. 15, we think is decisive of the first question presented. The ordinance in question was passed in the year 1866. There was a statute in force at the time which expressly conferred the power to pass such an ordinance. 1 Gavin & H. St. 226. In the case above referred to it was said by this court: "The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing upon the subject matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of

the corporation merely." As this ordinance was enacted by express statutory authority, the court did not err in taking it as the standard of duty by which the appellant was bound, and in refusing to hear evidence that it was unreasonable. The state could not deprive itself of the right to exercise the police power by granting to the appellant the right to regulate the speed of trains. Such a grant, even if it could be construed as contended here, would amount to a mere license, which might be revoked at the will of the Legislature, State *v.* Woodward, 89 Ind. 110. The police power of a state cannot be alienated even by an express grant upon a valuable consideration. Cooley, Const. Lim. 340; Thorpe *v.* Rutland & B. R. Co., 27 Vt. 140. The ordinance now under consideration is a police regulation, authorized by an act of the Legislature, designed to protect the people of the city of Indianapolis against the dangers incident to the rapid movement of engines and trains through thickly populated localities, and is binding upon the appellant as well as other railroad companies which have tracks within the corporate limits of the city.

The fact that the appellant and others had not been prosecuted for repeated violations of this ordinance would not, in our opinion, tend to prove that it had been abandoned. Such proof might tend to show that those charged with the enforcement of the ordinances of the city had been derelict in their duty, but that could not deprive any citizen who desired to do so of the right of availing himself of its provisions when occasion should require it. After a careful consideration of all the matters complained of, we are of the opinion that there is no error in the record before us for which the judgment should be reversed.

Judgment affirmed.

Negligence as a Question of Law and Fact.—For an especially well considered case upon this point, see Farrett *v.* Waterbury Horse R. Co. (Conn.), 46 Am. & Eng. R. Cas. 207.

Validity of Municipal Ordinances Regulating Speed of Trains.—See City of Lake View *v.* Tate (Ill.), 39 Am. & Eng. R. Cas. 703, and references in note, 707.

Injury at Crossing—Right of Traveler to Rely on Company to Perform its Duty.—See Grostick *v.* Detroit, L. & N. R. Co., *ante*, p. 332. Richmond *v.* Chicago & W. M. R. Co., *post*, and cases cited in note. Marks *v.* Petersburg R. Co., *post*, and cases cited in note.

Reasonableness of City Ordinance—Regulating Speed of Trains.—In Evison *v.* Chicago, M. & St. P. R. Co., 45 Minn. 370, it was held that an ordinance of the city of St. Paul, limiting the speed of railroad trains within the city limits to four miles an hour, was unreasonable and void as applied to a certain part of defendant's road in the suburbs of the city.

RICHMOND

v.

CHICAGO & WEST MICHIGAN R. CO.

(*87 Michigan 374.*)

Injury at Crossing—Contributory Negligence—Absence of Flagman—Question for Jury.—Where a railroad company is guilty of negligence in running detached freight cars over a crossing with any warning of their approach, when the flagman is not at his usual post of duty at such crossing, the contributory negligence of a street car driver, who was killed at such crossing, and who failed to look in the direction from which the cars were approaching, is for the jury, who should determine whether, under all the circumstances, the driver had the right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any danger signal from him, as an assurance of safety; and a finding that the deceased was not guilty of contributory negligence should not be disturbed.

CHAMPLIN, C. J. and GRANT J. dissenting,

Action for Death—Damages—Pecuniary Injury—Distribution.—In an action against a railroad company, under How. Mich. St. § § 3391, 3392, for the negligent killing of the plaintiff's intestate, the damages recoverable are limited to the pecuniary injury sustained by the persons entitled to share in the distribution of his personal estate; which distribution is governed by the statute existing at the time of the death of the intestate.

ERROR to Grand Rapids Superior Court.

Action to recover damages for the alleged negligent killing of plaintiff's decedent. Defendant brings error.

Smith, Nims, Hoyt & Erwin, (*M. J. Smiley,* of counsel,) for appellant. *J. M. Jamison,* (*Montgomery & Bundy,* of counsel,) for appellee.

MORSE, J.—The plaintiff's intestate in this case was the driver of a street railway car in the city of Grand Rapids, and on the 23rd day of April 1889, while driving his car on West Fulton street, in said city, was killed by a collision with a train of the defendant company at the street crossing. This is an action for damages on account of his death. Plaintiff recovered judgment in the Kent circuit court in the sum of $5,313. At the close of plaintiff's proof, the defendant demurred to the evidence, and asked that a verdict be directed in its favor, on the ground that the plaintiff was not in the exercise of due care and caution when the accident occurred, and therefore guilty of contributory negligence. This motion was denied, and the defendant thereupon put in proofs. This action of the trial court and other errors are alleged as reasons for the reversal of this judgment.

Facts.

We will first examine the question whether the court erred in permitting the plaintiff to go to the jury as to his own negligence. This must be decided, as is admitted by defendant's counsel, upon the case as made by the testimony on the part of the plaintiff.

This case is substantially as follows: Between the hours of 4 and 5 in the afternoon of April 23, 1889, Sherwood, with his car drawn by one horse, came down West Fulton street, approaching defendant's track. West Fulton street runs nearly east and west, and the railroad track crosses it nearly at right angles. Sherwood was going east. About 185 feet west of the defendant's track is another railroad crossing, that of the Lake Shore & Michigan Southern Railway. Sherwood was observed crossing this latter track on a walk. Beyond that to the east it is down grade, and he then started his horse on a trot, and continued until within 25 or 30 feet of defendant's crossing, when he "slowed down" to a walk. At this crossing, on the north side of West Fulton street and the west side of the railroad track, is a shanty used for a flagman who was stationed there to give warning of the approach of trains to the passers-by. To the north the view of the track was comparatively unobstructed, but upon the south side of the street, and to the west of the railroad track, was situated a lumber yard, lumber office, coal shed, lumber sheds, and piles of lumber, and posts, more or less obstructing the view of cars coming from the south. On the day in question there was at least one car loaded with lumber upon a side track in the lumber yard, which added to the obstructions.

The witnesses who testified to seeing Sherwood approach the track did not all see him in the same place; some did not notice him until he was within 25 or 30 feet of the track, and others not until he was right upon it. Others saw him as he crossed the Lake Shore & Michigan Southern track, and until he was injured, except such times as they were looking at the cars.

They do not agree as to what he was doing, except that he was on a walk within 25 or 30 feet of the track, and had hold of the lines, and some say one hand on the brake, and was standing in his usual place upon the front platform of his car. Some did not notice where he was looking. One witness says he looked straight ahead all the while, as if he was looking at the horse; others, that he looked to the north all the time, and towards the watchman's shanty. One witness, and the only one who so testifies, says that he saw Sherwood's head go both ways. He first observed him 40 or 50 feet back of the track.

Just as Sherwood got to the track a train of nine cars, detached from the engine, came down the track from the south. "Sherwood then stopped, put his hand on the brake, tried to 'brake up,' but could not. The horse was on the track, his forward feet across it. The horse gave a jerk, and pulled Sherwood over the dash board, and under the car." Sherwood died of the injuries there received. These cars were running, as testified by plaintiff's witnesses, at the rate of from 8 to 12 miles an hour, the majority estimating the speed at from 8 to 10 miles an hour. There was no warning of the approach of these cars, except the noise they made in running. There was no lookout on the forward car. There was a man standing on the third car from the front of the train, but he was looking northeast, and giving no attention to the crossing. The flagman was not at his usual post of duty, and no signal or warning was given by him until the horse was on the track. He then ran out of the shanty or flag-house in his shirt sleeves, and bare-headed, but too late to warn Sherwood of his danger.

The plaintiff's claim was that the defendant was negligent in the following particulars: (1) That the cars were run at too high rate of speed in violation of the city ordinance,—a speed which also, in view of the nature, locality, and surroundings, was, as a matter of fact, dangerous and negligent; (2) that no proper signals were given to warn those approaching the crossing, and particularly the deceased of the approach of the train; (3) the flagman was absent from his post of duty, which was outside of the flag-house, with his flag to give warning, (but was present in the flag-house in view of the deceased), and failed to give any warning of the approach of the train.

The negligence of the defendant is apparent from the evidence on the part of the plaintiff, and need not be discussed further.

It is contended by the defendant's counsel that the plaintiff's intestate was negligence as a matter of law; that there were places on the line of Sherwood's course before he reached the track where he could have seen these cars approaching, had he looked to the south; that at a point 40 feet west of the railway crossing the cars could have been seen before the lumber office obstructed the view; that a hundred feet of the track was visible by looking through between the office and the lumber piles; also that, at a point 25 feet from the crossing, a car could be seen 74 feet south of the crossing; and from a point 16 feet west of the crossing a car could be seen approaching from the south 167 feet south of the cross-

Negligence of deceased in not looking for cars.

ing, the street car track being in the center of the highway. We do not think from the testimony produced by the plaintiff that Sherwood could have seen the cars approaching from the south after he left the crossing of the Lake Shore & Michigan Southern Railway until he came within about 20 feet of the crossing. If he had looked, then he would have undoubtedly seen these cars in time to have stopped and avoided a collision. And it is pretty apparent—almost absolutely certain, from the plaintiff's own showing—that he did not look south within said 20 feet, until his horse was upon the track.

Whether he was negligent depends in a great measure upon whether or not he had a right to rely, under the circumstances, upon the absence of the flagman, and the lack of any signal of danger from him.

It is claimed by defendant's counsel that the obstruction of the view to the south, and the absence of the watchman from his post, called upon Sherwood to have stopped, and looked and listened, before he attempted to pass this crossing. This claim would be correct if, at this street crossing, no flagman had been stationed to give warning. But the testimony shows that a flagman had been kept at this point for three or four years, whose duty it was to signal by a flag in the street the approach of trains. It is not the law of this state that, under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways, and to listen for approaching trains. It is generally required, but it is not a rule of universal application. Every case must depend upon its own circumstances, and it would be unreasonable to apply such rule, under all circumstances, without regard to the condition of things at the time. Cooper *v.* Lake Shore & M. S. R. Co., 66 Mich. 266. Nor is a traveler compelled, under all circumstances, to stop before a crossing, if his view is obstructed from one way. He is only required to take such precaution as an ordinarily prudent man would under like circumstances, and whether or not he did not use such care is generally a question for the jury. See Guggenheim *v.* Lake Shore & M. S. R. Co., 66 Mich. 157, 158, 32 Am. & Eng. R. Cas. 89, and cases cited.

Plaintiff's counsel contend that, it appearing that the defendant had stationed a flagman at this crossing, whose duty it was to warn parties about to cross of approaching trains, it was for the jury to say whether the deceased, in keeping his eyes directed to the flagman for the very purpose of observing a signal at the earliest moment that it could be given, was not exercising due care. They cite the following cases in support of this contention;

Right of deceased to rely on flagman.

French *v.* Taunton Branch R. Co., 116 Mass. 537; Sweeny *v.* Old Colony & N. R. Co., 10 Allen, (Mass.) 377; Chicago, St. L. & P. R. Co. *v.* Hutchinson, 120 Ill. 587, 32 Am. & Eng. R. Cas. 82; Pennsylvania Co. *v.* Stegmeier, 118 Ind. 305; Glushing *v.* Sharp, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372; Cleveland, C. C. & I. R. Co. *v.* Schneider, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334; State *v.* Boston & M. R. Co., 80 Me. 430, 35 Am. & Eng. R. Cas. 356; Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 27 Fed. Rep. 159; Tyler *v.* New York & N. E. R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas. 296; Pittsburgh, C. & St. L. R. Co. *v.* Yundt, 78 Ind. 373, 3 Am. & Eng. R. Cas. 502.

In French *v.* Taunton, etc., R. Co., 116 Mass., the submitting of the question of contributory negligence to the jury was not affirmed upon the ground of the absence of the watchman alone, but in connection with the further fact that a train had just passed, and plaintiff did not suppose or have reason to suppose that another would follow so closely as they did, the cars doing the injury having been cut off from another train, and "shunted" down the track.

In Old Colony R. Co., 10 Allen, the flagman signaled the traveler to come on, and he went upon the track, relying upon such invitation. It was said by the court: "No express invitation need have been shown. It would only have been necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing."

In Pittsburgh, C. & St. L. R. Co. *v.* Yundt, 78 Ind. 373, 3 Am. & Eng. R. Cas. 502, the court say: "If the defendant had, for a considerable time before the accident, kept a flagman at the crossing to give signals on the approach of trains, and if the plaintiffs had been in the habit of crossing the railroad at that place, and observing the signals, and if, on the occasion of the accident, no signal was given, the plaintiffs not knowing that the services of the flagman had been dispensed with, these facts might be considered by the jury, in connection with all the other circumstances, in determining whether or not the plaintiffs were free from contributory negligence."

It is also said in Chicago, St. L. & P. R. Co. *v.* Hutchinson, 120 Ill. 592, 32 Am. & Eng. R. Cas. 82: "We are aware of expressions by this court, when passing upon the law and fact, and of like expressions by other courts of the highest respectability, that the failure of one approaching a railroad crossing to pause and look for the approach of trains was such negligence as would, in the case there under consideration, preclude a recovery. But we are not prepared

to say, as a matter of law, that a person approaching a railroad crossing, when there is nothing apparent to warn him of danger, and at which he knows a flagman is stationed, whose duty it is to warn all persons of danger from running trains, is required to look elsewhere than to the flagman. The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty. It may be that in this particular case a reasonably prudent and careful man would do more than observe the absence of the ordinary signal by the flagman; but, if so, the facts and circumstances should be submitted to the jury, to be considered by them in determining whether the party had, under all the circumstances, exercised ordinary care and caution to prevent injury."

In Glushing *v.* Sharp, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372, and in R. Co. *v.* Schneider, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334, there were gates at the crossings, attended by a gatemen, which gates were closed when there was danger of an approaching train, and open when there was no such danger. In both these cases, the gates being open, the persons injured drove in upon the track upon the assumption that there was no danger. Held, that such persons had the right to presume, in the absence of knowledge to the contrary, that the gatemen were properly discharging their duties; and that it was not negligent on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gatemen.

The following cases tend to support the plaintiff's contention that the question of Sherwood's negligence was for the jury: Tyler *v.* New York & N. E. R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas. 296; Chicago, R. I. & P. R. Co. *v.* Clough, 134 Ill. 586; Pennsylvania Co. *v.* Stegmeier, 118 Ind. 305; Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 27 Fed. Rep. 159; State *v.* Boston & M. R. Co., 80 Me. 430, 35 Am. & Eng. R. Cas. 356; Burns *v.* North Chicago Rolling Mill Co., 65 Wis. 312, 315. See, also, Shear. & R. Neg. § 466.

On the contrary, we are cited to a case in Pennsylvania where gates and a watchman had been kept at a crossing. The gates were lowered at the approach of trains. The gates were out of repair. Being open, the plaintiff drove a hose cart across the track without stopping or looking or listening. The watchman displayed no signal and gave no warning. The court held this to be contributory negligence on his part, and said, speaking through the chief justice: "I

do not understand the law to be that, where a railroad company adopts safety gates or other appliances for the protection of the public, the public are thereby absolved from the duty of taking any care of themselves. The plaintiff was bound to do his part. He had no right to omit the ordinary precaution merely because the gates were up. Each party should be held to the exercise of due care. If the rule to stop, look, and listen were observed, the accidents now so frequent could rarely occur, whether in town or country. It is as important in towns as in the country. It is sustained by competent authority, and founded on such excellent, common sense reasons that we will neither depart from it, or allow it to be undermined by exceptions. It is a clear and certain rule of duty, and a departure from it is more than evidence of negligence; it is negligence *per se*." Greenwood *v.* Philadelphia, W. & B. R. Co., 124 Pa. St. 572.

The evidence on the part of the plaintiff tended to show that the watchman was inside the shanty or flag-house. The door of this house opens on the east, facing the railroad track. There are two small windows in it, one in the north and one in the south end, so that the flag-man can see up and down the track both ways. It is claimed by the plaintiff that Sherwood was looking towards this south window, and could see the flagman therein before he reached the track, while the defendant claims that he could not have seen him until his horse was on the track. Of course, if Sherwood saw the watchman inside of his house, where such flagman could plainly see an approaching train, and the flagman gave no signal, it would be a more favorable circumstance to plaintiff, as bearing upon Sherwood's negligence, than if the flagman was apparently absent from his post, and Sherwood could not see him at all. The only evidence as to whether Sherwood could have seen the flagman through this window comes from two witnesses. Gilman, for the plaintiff, says: "The windows on the north and south sides of the shanty are well towards the east, and near the two corners. They are small windows. A person coming from the west, driving a street car, could not see through those windows, to see who was in the shanty, until he got opposite. When they got opposite they would be right up by the track." Rooney, for the defendant, says: "The driver could have seen him, [the watchman] if he was watching carefully for him, through the window that fronts Fulton street.

Under all the circumstances, I am satisfied that the court correctly submitted the question of Sherwood's negligence to the jury. He instructed them that "a railroad crossing is a place of danger, and is itself a warning to anyone about

to go upon it to be careful and vigilant to the extent of his opportunities. It was the duty of Sherwood in approaching the railroad track to use his sense of sight and hearing to ascertain whether a train was approaching, and, if the jury find he did not, then the plaintiff is not entitled to recover." That it was the duty of Sherwood to exercise due care whether or not the flagman was in sight, and, if the flagman was found not to have been present to give warning, such fact could be considered as bearing upon the negligence of both Sherwood and the defendant. "If the deceased, Sherwood, by the exercise of ordinary care and prudence, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so would amount to such negligence as would defeat plaintiff's right of action, unless you find that his attention at the time was directed to the flagman, at the flag-office, and that he had a right to rely on the position of the flagman, and absence of warning, as an assurance of safety. If the jury find the view of the track approaching from the south was obscured somewhat by lumber, etc., in Pierce's lumber yard, so that a train could only be observed by extreme care and caution, and that Sherwood knew this, then it was the duty of Sherwood to use such extreme care and caution as was appropriate to the circumstances. This would be true in a case where there was no flagman; but the question of the extent to which the deceased had a right to rely upon the position of the flagman, and his failure to give warning, is a question for the jury. It is the duty of every car-driver, when approaching a railroad crossing with passengers in his car, where his view of an approaching train is somewhat obscured, to stop, and look and listen, to insure himself that a train is not approaching, before he attempts to cross, unless the negligence of the duty of the company, through the absence of its flagman or his failure to give warning, was such a notice to Sherwood that it was safe to cross as would excuse an ordinarily prudent man from stopping, and looking and listening." "It was the duty of Sherwood, in approaching such crossing, to have his horse and car under control, so that he could respond quickly to the slightest intimation of danger; and if he approached the track, after he received such intimation, and thus contributed to the injury, then the plaintiff cannot recover. If the jury find that a person of ordinary care, driving the street car, as Sherwood was, might, by exercising proper care and diligence, have ascertained that the cars were approaching from the south at the time of this accident, then the plaintiff cannot recover

Question was properly submitted to jury—Instructions.

in this case, however negligent the railroad company may have been, and although the flagman was not at his post to give warning. If the railroad company was negligent, * * * and the flagman was negligent, and Sherwood was also so negligent as to in any manner contribute to the injury, then the plaintiff could not recover. To entitle the plaintiff to recover, he must establish that the death of Sherwood was caused by the negligence of the defendant. This, of course, requires a showing that Sherwood was not himself guilty of negligence which contributed to the injury. To constitute negligence contributing to the injury on the part of Sherwood, there must have been a failure on his part to observe and exercise ordinary care; and, if the plaintiff has shown that the deceased, Sherwood, used such care as men of ordinary prudence would have exercised under like circumstances, and placed as he was, then he was not guilty of contributory negligence. In determining whether the deceased, Sherwood, used due care, you have the right to take into account the obstructions to the south, their nature and extent, the manner in which Sherwood was driving, the fact of the defendant having maintained a flagman at the crossing, and the fact, if it be a fact, that this was known to Sherwood; and you have a right to take into account whether the deceased was watching for the flagman, the extent to which he had his car under control, the extent to which he looked out for trains; and you are then to say whether he used such care as men of ordinary prudence would have exercised under like circumstances, and, if he did use such care, he was not guilty of contributory negligence."

The defendant asked the court to instruct the jury, in substance, that the absence of the flagman from his post did not in the least excuse Sherwood from exercising his senses of sight and hearing to ascertain whether the train was approaching; and that, if the deceased, Sherwood, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so was such negligence as would prevent plaintiff's recovery. This was refused, and it will be seen that the court left it to the jury to determine whether, under the circumstances, Sherwood had a right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from such watchman as an assurance of safety; and they were instructed that, if an ordinarily prudent man would have done the same as Sherwood did under the same circumstances, the plaintiff could recover.

I find no errors in the charge on the subject of negligence. There were no material errors in receiving or rejecting testimony.

It is alleged that the court erred in his instructions as to damages. The evidence showed that the next of kin consisted of his mother, Fannie Sherwood, two brothers, Seth W. and Frank Sherwood, and two sisters, Ella and Marcella Sherwood. The deceased lived with his mother, as did his sister Ella, who was an invalid. Frank lived with his mother. The older son, Seth, had not been heard from in five years, at which time he was in Wisconsin. Mrs. Sherwood testified that deceased helped her from eight to ten dollars per week. He also assisted her in her work about the house when he was off duty as car-driver. He was thirty years of age at the time of his death. She testified that his board, allowing him for his help about the house, was worth about $2 per week. Frank worked at a restaurant for $1 a day, and contributed some to the support of the family. Since the death of Cady, the deceased, Frank has contributed nearly his entire wages to the support of the family; before that about $2 per week. The oldest daughter, Marcella, boarded and lodged at home, but contributed nothing to the support of the family. The mother testified that the deceased contributed $2 per week towards the support of his invalid sister, Ella. Ella was twenty-one and Mrs. Sherwood fifty-four years of age when Cady died. The court instructed the jury: "If you find the plaintiff entitled to recover, he is entitled to recover damages to the extent of the pecuniary loss which the mother and next of kin of the deceased, Mr. Sherwood, have sustained by his death. This amount will be such an amount as the jury are able to say it is reasonably probable would have been contributed by the deceased to their support had he lived. The jury cannot go beyond the term of the expectancy of life of the deceased, which is shown by the tables to have been 35.33 years, and, in weighing the testimony as to the contributions which would have been likely to have been made to the mother of the deceased, the jury cannot extend these beyond the period of her expectancy of life, which is shown by the tables to have been 18.79 years. As to the testimony of contributions to the sister, these cannot be considered, except for the period after the probable decease of the mother, and, under the testimony, such contributions are said to have been included in the sum which was contributed to the family. It is not for the court to intimate what amount of contributions the deceased would have contributed to the family, nor is the evidence of what he had in his life-time contributed conclusive upon this subject, but it is evidence which the jury have a right to consider for what it is reasonably worth, and it is for the jury to say what it is reasonably

Instructions as to damages.

probable that the deceased would have contributed, both as to the extent and duration thereof, not exceeding the time stated as his expectancy of life, and not exceeding the amount shown to have been contributed in his life-time; and, if you are able to fix the sum which he would have annually contributed, then I charge you that the plaintiff should recover only the present worth of that sum, as you may find it to be, not exceeding in amount ten thousand dollars, the amount stated in the declaration."

The statutes giving damages in cases like the present are as follows:

How. St. § 3391, subd. 7: "Whenever the death of a person shall be caused by wrongful act, neglect or default of any railroad company or its agents, and the act, neglect or default is such as would (if death had not ensued) entitle the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the railroad corporation which would have been liable if death had not ensued shall be liable to an action on the case for damages, notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Id. § 3392, subd. 8: "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in such action shall be distributed to the persons, and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered: provided, nothing herein contained shall affect any suit or proceedings heretofore commenced, and now pending in any of the courts of this state.'

We held in Van Brunt *v.* Cincinnati, J. &. M. R. Co., 78 Mich. 530, that, under these statutes, none of the next of kin could recover, unless they showed a pecuniary injury on account of the person killed; and if, as in that case, the proofs showed no person pecuniarily injured by the death of plaintiff's intestate, there could be no recovery; that it evidently was not the intention of the legislature to make one rule of damages in the case of a person killed through the negligence of a railroad company, and another rule in the case of a person killed by some person or corporation other than a railroad company. See Van Brunt *v.* Cincinnati, J. & M. R. Co., 78 Mich. 530, and cases cited. Under this holding, damages in this case could only be recovered on account of the mother, and the sister Ella, as no pecuniary injury was shown to the

others by Sherwood's death. The court, in effect, so limited it, and was also correct in allowing no damages to be computed on account of the sister until after the mother's death, as, under the testimony, these contributions to the sister were included in the contributions to the family.

It is urged that the court erred in allowing the recovery of any damages on account of the sister Ella, because under the law of distribution of the personal property of intestates passed in 1889, and which was in force at the time the verdict was rendered, the whole of the personal estate of the son descended to the mother, and she would therefore be entitled to the whole of the damages. Pub. Acts 1889, p. 193. But the distribution of the personal property of Sherwood's estate would, we think, be governed by the law in reference thereto existing at the time of his death, which provided that the property in such a case as this should descend, one-half to his mother, and the remainder in equal shares to his brothers and sisters. Pub. Acts 1883, p. 181. See, also, How. St. § 5847, subd. 6.

The council for defendant argue, further, that, if the personal estate descends under the law of 1883, section 3392 of Howell is invalid and inapplicable, because, by the latter statute, the jury is authorized to give such amount of damages as they deem fair and just to the persons who may be entitled to such damages when recovered. And this has been construed to mean that the jury may give such damages as have been sustained by the several persons who have suffered pecuniary loss. But, as the same statute also provides that the money so recovered shall be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, it is argued that the brothers and sisters are all put upon the same footing, whether any damages have been recovered on their account or not; and that in this case, if the other sister and the brothers should apply to the probate court for their share, such court could not refuse to order it turned over to them. They would thereby receive money, in effect, for damages which the statute would not permit to be recovered on their account, because they had suffered no pecuniary loss by their brother's death.

There is a seeming contradiction or inconsistency in this statute under the construction given it in Van Brunt *v.* Cincinnati, J. & M. R. Co., *supra*, but, as so construed, it is identical in its provisions with section 8314, How. St., under which statute damages have been recovered, and affirmed by this court in a number of cases. And in Hunn *v.* Michigan Cent. R. Co., 78 Mich. 513, 41 Am. & Eng. R, Cas. 452, the as-

sessment was affirmed as proper of nominal damages only to the brother and sisters of Hunn, who were entitled to a share with the widow of the personal estate of the deceased under our laws of distribution of personal property.

The same objection, with more elaboration, was made to a statute of New York, similar to ours, by HOAR, J., in Richardson *v.* New York Cent. R. Co., 98 Mass. 85, 90, 91, but the case was not, however, decided upon that ground.

What disposition is made of the money recovered, if the defendant is liable for it for pecuniary damage suffered by any of the next of kin through its negligence does not concern the defendant. When a conflict arises under this statute as to the distribution of the money recovered as damages, it will then be competent and necessary for the courts to decide who are entitled to the fund. The damages are manifestly to be given in reference to the pecuniary injury resulting from the death to those persons who may be entitled to such damages when recovered. See section 8314, How. St.; Van Brunt *v.* Cincinnati, J. & M. R. Co., 78 Mich. 530. It would seem that in this case the damages should have been given as they were under the charge of the court in reference to the pecuniary injury suffered by the mother and the sister Ella, and there also would seem to be no serious difficulty in the way of their obtaining it from the administrator.

Distribution of damages.

It is claimed that the verdict was excessive. With that we have nothing to do. But if the jury found that Sherwood contributed $7 a week to his mother, and $2 per week to his sister, as they were warranted in doing from the proofs, considering the expectancy of life of the mother and son, the verdict cannot be said to have been excessive. The judgment is affirmed, with costs.

Verdict not excessive.

MCGRATH and LONG, J.J., concurred with MORSE, J.

CHAMPLIN, C. J., (*dissenting.*)—I think the judgment in this case should be reversed.

What the law requires of all parties is due caution to avoid negligently injuring another, and it requires the same care or caution to avoid being injured by the negligence of another. This care or caution or precaution is not measured by the care that people generally or ordinarily observe respecting themselves and their affairs, but it is measured by the occasion and the circumstances under which the danger or injury is threatened, and calls upon persons placed in a position known to be dangerous to exercise active diligence and foresight to avoid it; and the test is not what an ordinarily prudent person

Plaintiff was guilty of negligence.

would do, but is, what should a prudent person do under the circumstances?

To say that a person is excused from exercising due and proper care to avoid injury or accident, if he does as people ordinarily do without distinguishing between careless people and prudent people, is to lay down a rule that carelessness is ordinary prudence or caution. It is an ordinary trait of character for most people, old and young, daily to take risks involving danger of injury to their persons. It is a natural trait of young people, before they have arrived at an age where deliberation succeeds to impulse, and out of the experience of their lives in suffering from undue haste they learn to be cautious, to take risks, and hazard their personal safety. It takes some a longer time than others to learn these lessons of prudence, and some never learn them; and, if a thousand heedless persons rush into danger, there is no reason why the heedlessness of one such person, who, taking the chances, receives an injury, should be allowed to recover because a thousand neglected to exercise prudence. The question is not what others would do or might have done, but it is, did he exercise prudence and due care to avoid the injury, under the circumstances by which he was surrounded?

Plaintiff's intestate was in a position to know the danger encountered at that crossing. The law and common sense required him to exercise prudence in approaching it,—that is, not to rush upon it at an immoderate rate of speed; and it called upon him to use that precaution to avoid being run upon and injured which the circumstances and surroundings permitted him to exercise by looking for himself up and down the track to see if a train was approaching.

I do not think the deceased was excused from exercising his faculties of sight and hearing by the fact that a watchman had been employed at the crossing, and the further fact that the watchman was not in his sight. He had no right to presume when the watchman was absent that he could safely cross the track. It might have been different if he had seen the watchman at his station, and he gave him no intimation that there was any danger to be apprehended in crossing.

GRANT, J., (*dissenting.*)—West Fulton street, in the city of Grand Rapids, runs nearly east and west, and crosses the defendant's road nearly at right angles. Plaintiff's decedent was a street-car driver, and was driving east on this street. About 185 feet west he had crossed the track of the Lake Shore & Michigan Southern Railway. He crossed that track upon a walk, after which he started his horse upon a trot, and, when within from twenty-

Facts reviewed.

five to thirty feet of the defendant's road, he had "slowed down" to a walk. He continued at this pace until he was upon the defendant's track, when he was struck by some cars, passing over defendant's road to the north, and was killed. Plaintiff recovered verdict and judgment in the circuit below, and defendant appeals. A flagman had been stationed at this crossing for about four years. It is claimed by the plaintiff that this flagman was not at this time at his post of duty, giving the customary signals of an approaching train. Defendant requested the court to direct a verdict for the defendant, on the ground that plaintiff's decedent was guilty of contributory negligence. It is evident that Mr. Sherwood, when within twenty-five feet of the center of the crossing, could have seen the cars approaching from the south, at a distance of seventy-four feet from the crossing. When within sixteen feet he could have seen them 167 feet distant, and when within twelve feet he could have seen them full 300 feet distant. He did not look in that direction, nor stop his car to look or listen, but drove steadily along at a walk until his horse was upon the track, and the front end of his car projected over the track when they were struck by the approaching cars. It was down grade at this point of the defendant's road. Defendant's employes were doing what is commonly called a "kick." The cars were set in motion, and a brakeman left on top to stop them. These cars were to be stopped just north of Fulton street, and left until defendant got through with switching at another point. It is evident that the deceased did nothing to inform himself as to whether or not a train was approaching, except it were to look for the flagman and a signal from him.

The theory of the plaintiff is that the deceased was looking to the flagman's shanty, within which it was claimed the flagman was at the time, and that he had the right to rely and act upon the absence of the flagman as a notice that no train was approaching,, and that it was a question for the jury to determine whether or not he was guilty of contributory negligence. The following is all the testimony given by the plaintiff in regard to the conduct of the deceased, Benjamin Hall testified: "From the time I first saw the driver, which was when he was about half way between the Lake Shore and the Chicago & West Michigan track, I watched him all the while until the accident occurred. I couldn't say as to how he was looking. I don't know. He continued to walk down. The horse walked all the way until it got on the track. I couldn't tell whether he was looking to the right or to the left." Joseph E. Ingley testified: "I observed the driver just as he

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was half way between the lumber office and Pickell's office, in the coal-yard, about twice the length of the street-car from the railroad track. He was standing facing his horse with his right hand on the brake, and the lines in his left hand, looking straight,—looking, as I should think, at the horse more than anything else,—looking ahead. I cannot state whether or not he looked to the north or south. He was driving at a walk." Witness further said that when he saw the railroad train he thought it was 138 feet south from Pierce's office, and he should judge that the street-car was then forty feet from the railroad track. Byron R. Weeden testified that he saw the car, but not the driver, when just a little ways west of the West Michigan track, and the horse was on a walk. Frederick S. Parks testified: "I observed the driver of the street-car forty or fifty feet back of the track. He was driving with his right hand on the brake, and his left hand on the lines. He came down to a walk about thirty feet from the track, as near as I judged. I saw his head go both ways. He looked straight ahead again from that on. He neither looked to the right or left, till he got pretty close to the track." David F. Coggswell testified that he saw Sherwood back almost to the Lake Shore crossing; that he was then driving between a trot and a walk; that as he neared the West Michigan crossing he was driving slow; that about thirty feet from the track he drove behind the flagman's station, so that witness could not see him again till he came out from behind the building; and that when he again came in sight he could not say whether he was on a walk or not. David Forbes testified that his attention was first attracted to the situation by the blowing of the whistle; that he then saw the street-car driver going east; that after he got off the Lake Shore road he started on a pretty good jog, but slowed up as he went on, and was very near on a walk when he got to the track. This testimony affords no foundation for the claim that he was looking specially at the flagman's station to see if he was within. He could not look within it until he was opposite thereto, and very close to the track.

The deceased's occupation, in which he had been employed for some time, took him over this track many times every day. He was perfectly familiar with the situation. He knew that switching was liable to be done there at any time, and that it was usually done about the time of day that this accident occurred. Some of the witnesses for the plaintiff, standing a considerable distance away, heard the whistle, saw the approaching train, and recognized the danger which the deceased was approaching. So, also, did some

of the witnesses for the defendant; one of whom testified to halloing to the driver, and warning him of the danger.

Under this state of facts, I am unable to see how reasonable minds can differ as to the conclusion to be drawn therefrom. A glance to the south would have disclosed to the deceased the approaching cars in season for him to stop, just as surely as a glance would have disclosed to him the absence of the flagman. The one conclusion, therefore, is that he was taking no precautions whatever in his approach to this most dangerous place. If there had been no flagman stationed at the crossing, he would, under all the authorities, have been guilty of contributory negligence. Therefore the question is clearly presented by this record, did the absence of the flagman release him from taking any precautions to determine whether or not a train was approaching? He had the lives, safety, and property of others under his charge and control. It is the universal and reasonable rule that in all such places one must always be in the exercise of due care, to protect, not only himself, but those who are temporarily committed to his charge. Certainly a rule that would absolve him from exercising at least ordinary precaution is not founded upon reason or upon humanity. Whatever risks one may see fit to take when he himself is concerned, he certainly should be held to exercise reasonable care when he is taking others, who cannot look out for themselves, into places of danger. Is it a reasonable rule towards the traveling public to hold that a street-car driver may place implicit reliance npon the absence of a flagman, and drive his car with its load of passengers upon the track of a railroad, without any precautions whatever to ascertain whether danger is approaching, and to avoid it? If it is not so far as his passengers are concerned, it certainly is not as to himself. The deceased had no right to transfer the exercise of his own sense of hearing and seeing to another. Even the slightest care on his own part would have avoided the accident, for a glance would have shown him the danger. Being upon a walk, he could, by applying the brake, have stopped his car almost instantly, and within a distance of two or three feet.

The adoption of safety gates, and the stationing of flagmen at these crossings, are wise additional precautions for the safety of those upon the trains, as well as of those who are crossing upon the streets. But they should not be held to change that reasonable rule requiring care on the part of all who enter upon places of danger. The books furnish many cases where flagmen, and even those in charge of the gates, do not perform their duty, and hence are negligent, which

negligence is to be attributed to the railway companies. It would, however, be unreasonable, in my judgment, to permit parties approaching these crossings to assume that these flagmen and gate-keepers will always do their duty. In the absence of the flagman, I think it was the duty of the deceased to stop and look and listen before driving upon the track. This rule is clear, certain, and reasonable. The exercise of even slight care on the part of those approaching these dangerous places on our public highways would avoid a great majority of the accidents.

At the time this accident occurred a bill was pending in the legislature, and was passed shortly thereafter, requiring street-car drivers to bring their cars to a full stop before going upon these railway crossings, and to make sure that no engine or cars were approaching, and imposing a fine of $25 for neglect to do so. This statute, in my judgment, but adopted the reasonable rule of the common law. It is well grounded in reason and a wise public policy. It is the only rule which can afford protection to the traveling public. It is not unjust to the traveler who has the control of his own volition, and the power to so easily inform himself and avoid accident. Were it not a reasonable rule, the legislature would have no right to impose a penalty ofr its violation.

But plaintiff's counsel strenuously insist that this was a question for the jury. Courts should be very careful not to encroach upon the province of the jury, but, at the same time, they should be equally careful not to abdicate their own functions to the jury. It is the clear duty of the courts to instruct the jury as to the legal effect of undisputed facts, unless different conclusions can be drawn by reasonable minds from such facts. An act which is *per se* negligent is not rendered prudent and careful, within the meaning of the law, by the fact that many do it. So the fact that the street-car drivers were at this time in the habit of driving over this crossing without stopping, or taking other precautions to avoid danger, was incompetent and immaterial, and did not relieve the deceased from that duty which he owed to himself and to others.

It is but just to the flagman to say that, under the evidence of the defendant, he gave the signal required by law. But, under the evidence of the plaintiff, both he and the deceased were equally guilty of gross negligence. The law imposed a plain duty upon each, which each neglected to perform.

Judgment should be reversed, with costs of this court, and a new trial ordered.

Injury to Travelers at Crossings—Right to Recover as Affected by Contributory Negligence.

Obstructed View—Traveler Going on Crossing after Passage of One Train and Being Struck by Another.—In Kane *v.* New York, N. H. & H. R. Co. (N. Y., March 8, 1892), 30 N. E. Rep. 256, which was an action for injuries received at a crossing, it appeared that, while attempting to drive across the track, plaintiff was struck by a train going west, the approach of which was obscured by a train going east. Plaintiff had been waiting to cross while the east-bound was passing, and, seeing the gate go up, attempted to cross, but was shut in on the track by the lowering of the gate on the opposite side. There was evidence that a mound of rocks fifteen or twenty feet high stood by the track, obstructing plaintiff's view of the approaching train, and that it was dark when the accident occurred. *Held*, that the question of contributory negligence was for the jury.

Obstructed View—Misunderstanding Signal.—Plaintiff's intestate was killed at a crossing where there were six tracks. The intestate drove his team, which was gentle, and under his control, at a walk upon the crossing without perceiving any approaching train, though he looked and listened, the view being obscured by cars and buildings. While he was crossing, some men signaled him to stop, but, he, misunderstanding the signal, started his team at a trot. They became unmanageable, on seeing the approaching train, and he was run over and killed. *Held*, that the question of contributory negligence was for the jury. Baltimore, O. & C. R. Co. *v.* Walborn, 127 Ind. 142.

Obstructed View—Failure of Flagman to Give Warning.—In Dillingham *v.* Parker (Tex., April 24, 1891), 16 S. W. Rep. 335, it appeared that two children, ten and eleven years old respectively, were killed at a railroad crossing. The evidence showed that they looked but could not see the advancing train because a fence and another train were in the way. The flagman stood facing the children, and talking to some girls, but did not wave his flag. *Held*, that the question of the children's negligence was for the jury.

Failure of Company to Give Signal.—Where a jury find that the injured person would not have ventured upon the track at a crossing, and would have incurred no risk of collision with the train but for the negligence of the engineer in failing to give timely warning of its approach, the corporation is liable to answer in damages, although the plaintiff may have been careless in exposing himself to danger. Hinkle *v.* Richmond & D. R. Co. (N. Car., Nov. 24, 1891), 13 S. E. Rep. 884.

Driving on Track with Ears Muffled with Knowledge that Train is About Due.—In Norfolk & W. R. Co. *v.* Stone (Va., July 23, 1891), 13 S. E. Rep. 432, it was held that a boy thirteen years old, who drives upon the track at a railroad crossing with which he is familiar, with his ears muffled, although he has just been told that the train is late, and will probably reach the crossing at about the same time he does, is guilty of such contributory negligence as will prevent a recovery for his death, although the train was running at a high rate of speed and the whistle was not blown.

Discovery of Train after Having Driven Partly on Track—Duty to Turn Back.—In Beanstrom *v.* Northern Pacific R. Co., 46 Minn. 193, it was held that whether a person who, after he had driven partly upon a railroad track, discovered a train approaching, should have backed his team or turned them around instead of attempting to cross, was a question for the jury.

Dangerous and Difficult Crossing—Driving Sled with Ears Muffled—Question for Jury.—In an action against a railroad company for an injury received by plaintiff at a highway crossing, it appeared in evidence that

plaintiff, who was familiar with the locality, was driving his team with a heavily loaded sled down a hill towards a crossing and had his ears covered to protect them from the cold; that a strong wind was blowing towards the direction from which the train came; that he stopped several times on the descent to look and listen for trains, but, not seeing nor hearing any, drove slowly on, and, when within half a rod from the track, first heard the whistle of the engine, but was then unable to stop his horses. *Held*, that the court erred in taking the question of plaintiff's contributory negligence from the jury and directing a verdict for defendant. Siegel *v.* Milwaukee & Northern R. Co., 79 Wis. 404.

Reliance on Belief that Train will Run at Certain Speed Fixed by Ordinance.—A traveler has no right to attempt to cross a railway track in front of an approaching train at what is nothing more than a common country crossing, although it is within the limits of a city, or to use a part of the railway within said limits as a footpath, relying solely upon the expectation or belief that the trains will be run not to exceed a certain rate of speed fixed by city ordinance. Studley *v.* St. Paul & D. R. Co. (Minn., Jan. 21, 1892), 51 N. W. Rep. 115.

Existence of Gates at Crossing which were not Lowered—Instructions.—In an action against a railroad company for personal injuries sustained by a traveler at a crossing of a highway at grade by its tracks, an instruction to the jury that the existence there of gates, seemingly intended to be closed when trains pass, did not excuse him from looking before crossing, but that he had a right to take the fact into consideration on the question to what extent he would look, is not contradictory, and is correct. Merrigan *v.* Boston & Albany R. Co., 154 Mass. 189.

Crossing Track while Safety Gates were Down.—In Cleary *v.* Philadelphia & R. R. Co., 140 Pa. St. 19, it appeared that plaintiff's intestate, while the safety gates at a crossing were down, started to cross the road at a place where there were four tracks. While he was looking at one train he was struck by another. He knew that the lowering of the gates was a danger signal; that it signified the occupation of the tracks by passing trains. It was broad daylight when he stepped in front of the moving train. *Held*, that the plaintiff was guilty of negligence, and a non-suit was proper.

Horse Becoming Frightened and Rushing on Track—Failure to Hear Signal.—In Bates *v.* New York & N. E. R. Co. (Conn., March 20, 1891), 22 Atl. Rep. 538, which was an action for injuries at a crossing, it appeared that about seventy feet north of the crossing the highway was level, commanding a view of the track west for nearly a mile. About eighty feet north the highway ascended, and the view was obstructed by a wall and bank up to a point 400 feet north, where a clear view was again obtained. Deceased was driving down the hill from the north, sitting on one of the string-pieces of a wood-rack on his wagon, and in that position he could not so readily see the track or so well control his horse as from the raised seat of an ordinary wagon. The train, approaching from the west, was not in sight when he was at the point 400 feet north. He was at the level place in the highway when he first saw the train, and his horse, becoming frightened, and notwithstanding his efforts, rushed in front of it, and the injury ensued. It did not appear that he heard the whistle, which was sounded 400 feet beyond the proper place. It could have been heard, but might have been mistaken for a signal for a crossing further west, as the wind was blowing towards the engine. *Held*, that he was not guilty of contributory negligence.

Child Crossing Track—Approaching Train Obscured by Cars on Side Track.—A child seven years of age attempting to cross a railroad track at a street crossing, when a train standing on such crossing is so moved

as to give a clear passage way, is not guilty of such contributory negligence as will defeat a recovery by its father, if another train on an opposite and parallel track, and only a few feet from the first track, unseen by the child, suddenly strikes and injures such child in attempting to cross the second track, when if it had remained standing between the tracks it would have escaped injury. Louisville, New Albany & C. R. Co. *v.* Rush, 127 Ind. 545.

Crossing Two Tracks—Stepping Back on First Track after Passing Over It.—Plaintiff's intestate attempted to cross a street on which were two railroad tracks, about nine feet apart. Just as he reached the second track, a train on it came up, and, in order to avoid it, he stepped back upon the first track, and was struck by engine that was backing up on that track. *Held,* that the railroad company was not responsible for the accident. McClary *v.* Chicago, M. & St. P. R. Co., 46 Fed. Rep. 343.

Sufficiency of Evidence to Warrant Finding that Plaintiff was not Negligent.—In Evans *v.* Concord R. Corp. (N. H., July 25, 1890), 21 Atl. Rep. 105, it was held that a finding that the intestate was not negligent was supported by evidence that the train which ran over her was a special train running near the time of a regular train; that intestate was afraid of the cars, and usually waited at home until trains had passed; that she had her watch with her; had a safe horse and stopped at the foot of the ascent to the track; that the view was somewhat obstructed, and that the signal required by statute was not given.

Attempt to Climb Over Bumpers Between Cars.—A person traveling in a public street, and finding it obstructed by a freight train at full stop, to which a locomotive is attached, who, relying upon the assurance of a brakeman that he can safely climb over the bumpers, and pass between the cars, as the train will remain stationary for some time, attempts to do so, and while in the act suffers an injury by the train being started suddenly, without warning by ring the bell or sounding the whistle, is guilty of such contributory negligence as will prevent his recovery for the injury. Renner *v.* Northern Pacific R. Co., 46 Fed. Rep. 344.

A train standing upon a highway, with an engine attached, is of itself notice of danger; and, in the absence of a special assurance on the part of the railroad company to one desiring to cross between two cars, over the couplings, that he may safely do so, so far as any movement of the train is concerned, he assumes all risks incident to such an attempt. Bird *v.* Flint & P. M. R. Co., 86 Mich. 79.

Contributory Negligence—Climbing Over Stationary Cars Obstructing Crossing.—In Corcoran *v.* St. Louis, I. M. & S. R. Co., 105 Mo. 399, it was held that the act of climbing over stationary cars without knowing whether or not they are attached to an engine is such negligence as to prevent recovery for injuries received in the attempt, and this is true although the cars were obstructing the street crossing in violation of the city ordinance. This rule is applicable to a police officer, in climbing over a car, whose duties require him to cross the track, it not appearing that the company's servants knew of his perilous situation, and they not being required to look for him where he had no right to be.

Child Attempting To Climb Over Cars Standing Across Street.—Where a railroad company stops its train not to exceed a minute as it approaches a railroad crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, on his way home from school, attempts to take hold of the brake-ladder on a freight-car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get onto the car and jerks him off, so that he falls under the wheels, and is run over and injured, and the trainmen have no knowledge of the attempt upon the

part of the boy to board the train, *held*, that the company is not guilty of such negligence towards the boy as to render it liable for damages on account of such injury. Atchison T. & S. F. R. Co. *v.* Plaskett, (Kan., April 11, 1891), 26 Pac. Rep. 401.

Passing Through Opening Between Cars—Implied Invitation of Company.—Where a railroad company was in the habit of making an opening in its trains at a point on its track to enable the public to cross and a traveler on coming to said crossing found the cars so separated as to induce him and the public to believe that the company intended that it should be used for a crossing, and he did so believe, then he was justified in acting on such implied invitation and the company owed the duty, under the circumstances, of giving him some reasonable or suitable warning of its intention to close the opening, and would be liable if it neglected to do so, and because of such neglect he was injured while passing through. Where, however, the railroad, in such case, had placed its cars in such close proximity that it was dangerous or hazardous for any one to pass between them, and it would appear to a reasonably prudent man that the company did not intend the public should use said opening as a crossing, then the implied invitation to pass was revoked and a traveler is not justified in risking himself between the cars. Gurley *v.* Missouri Pacific R. Co., 104 Mo. 211.

Injury at Defective Crossing—Going Outside of Traveled Way.—In an action to recover damages on account of injuries received by a horse falling through a hole in a railroad crossing, if it appears that the plaintiff rode near the side, out of the route usually traveled, and which could have been used with safety, and was injured by her horse stepping into the hole, she was guilty of contributory negligence. Patterson *v.* South & North Ala. R. Co., 89 Ala. 318.

Driving Over Defective Crossing With Knowledge of Defect.—In an action against a railway company for personal injuries sustained by the plaintiff while attempting to drive a loaded wagon over the defendant's track at the crossing of a highway, the fact that when such attempt was made the plaintiff knew that the crossing was defective is not of itself conclusive proof of contributory negligence, where it appears that the defect in the roadway was not necessarily dangerous. In such case it is a question for the jury to determine whether, under the circumstances, the plaintiff was justified in attempting to cross the track, and whether he used due care in doing so. St. Louis I. M. & S. R. Co. *v.* Box, 52 Ark. 368.

Failure of Train Hands to Exercise Care After Discovering Danger.—In Galveston,, H. & S. A. R. Co. *v.* Matula, 79 Tex. 577, it was held that the contributory negligence of one, injured at a crossing by a railroad train, will not prevent a recovery, where those in charge of the train, after discovering the danger, failed to see the means in their power to prevent or lessen the injury, which would otherwise not have happened.

Recovery Notwithstanding Contributory Negligence—Cause of Injury—Instructions.—In Memphis & C. R. Co. *v.* Jobe, (Miss.,) 10 So. Rep. 672, which was an action for injuries to plaintiff, caused at a crossing by a train running at an unlawful speed, where the principal question was as to plaintiff's contributory negligence, it was held to be error to charge that plaintiff, though guilty of negligence, could recover, "unless this negligence was in whole or in part the cause of the injury.'

Gross Negligence of Company Which Will Overcome Defense of Contributory Negligence.—In Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, it was held that a mere running of a train at a high rate of speed at a crossing which is not in a populous district, nor the failure to give the statutory signals on approaching nor the failure to keep a proper lookout, nor other

mere omission of duty under circumstances showing mere negligence as distinguished from recklessness or wantonness, will not defeat the defense of contributory negligence in an action for injuries received at a railroad crossing, where the traveller failed to exercise proper precautions in looking and listening for approaching trains.

In Connecticut it is said that the rule is firmly settled that where the plaintiff, in an action for injuries received at a highway crossing, has been guilty of negligence which contributed to the injury sued for, no recovery can be had, although the defendant was guilty of gross negligence. Rowen *v.* New York N. H. & H. R. Co., 59 Conn. 364.

Contributory Negligence as a Defense Must Be Shown by Preponderance of Evidence.—In Denver & R. G. R. Co. *v.* Ryan, (Colo., Nov. 16, 1891) 28 Pac. Rep. 79, it is said that where a defendant relies upon the contributory negligence of the plaintiff as a defense, such contributory negligence must be shown by a preponderance of evidence, or the defense will be unavailing. The court said: "To our minds it seems plain that there is no essential difference between the negligence of a defendant which may render him liable in an action of this kind and the contributory negligence of a plaintiff which may relieve from such liability. The very phrase 'contributory negligence' implies that the latter is of the same intrinsic nature, and contributes to cause the same effect, as the former. In the absence of evidence, direct or circumstantial, the law never presumes any party to have been guilty of negligence. On the contrary, it presumes every one to have been diligent, or free from negligence, until negligence is affirmatively shown. This presumption of diligence or of freedom from negligence attends both plaintiff and defendant. Hence, to warrant a verdict against the defendant on the ground of his negligence, the law requires that his negligence shall be affirmatively shown by a preponderance of the evidence; and in like manner, to warrant a verdict against the plaintiff on the ground of his contributory negligence, the law requires that his contributory negligence shall be affirmatively shown by preponderance of the evidence. On the one side, the negligence of the defendant is relied on as the gist of the action; on the other side, the contributory negligence of the plaintiff is relied on as the gist of the defense. It is true, the complaint in an action for negligence usually contains the averment that the plaintiff, 'without any fault or negligence on his part, was injured by reason of the negligence of the defendant. In consequence of this negative averment it has been supposed that the plaintiff must offer some affirmative evidence of the absence of negligence on his part in the first instance. But this does not follow. The negative averment, even if necessary,—a point we do not decide,—serves substantially as a plea of not guilty to any counter-charge of contributory negligence which may be made by defendant. In the absence of evidence of defendant's negligence, the defendant is saved from defeat. So, in the absence of evidence of plaintiff's contributory negligence, the plaintiff is saved from defeat on that ground. Perhaps the matter may be stated more clearly and logically thus: As the absence of evidence tending to show defendant's negligence leaves the charge of negligence unsustained against defendant, so the absence of evidence tending to show plaintiff's contributory negligence leaves the countercharge of contributory negligence unsustained against the plaintiff. It sometimes happens that evidence tending to show contributory negligence on the part of plaintiff may be elicited from his own witnesses when giving their testimony in chief. In such case, unless such evidence be contradicted, or rebutted by counter-evidence tending to show plaintiff's diligence, or freedom from negligence, he should, of course, suffer defeat, either by nonsuit or by the verdict of the jury. But this does

not affect the correctness of the rule that contributory negligence, the same as any other negligence, is a matter to be proved, and that, in the absence of evidence. it is not to be presumed. Hence, where a defendant relies upon the contributory negligence of the plaintiff as a defense, whether the averment in respect thereto appear negatively in the complaint or affirmatively in the answer, such contributory negligence must be shown by a preponderance of the evidence, or the defense will be unavailing. In general, from whatever source evidences of negligence or of contributory negligence may come, they are to be considered and weighed together, and the same quantum of proof will be required to establish one as the other."

When Contributory Negligence Is a Matter of Law.—Whether the plaintiff was guilty of contributory negligence is generally a question of fact for the jury, but when no other inference than that of his negligence can be reasonably and fairly drawn from the evidence, it should be so declared as a matter of law. Corcoran *v.* St. Louis, I. M. & S. R. Co., 105 Mo. 399.

When a Question For Jury.—Where a railroad company is sued for injuries received by a person at a highway crossing, the jury must pass upon the negligence of the plaintiff unless such negligence is proved by such conclusive evidence that there can be no difference of opinion as to its existence upon a mere statement of the facts, Lake Shore & M. S. R. Co. *v.* Johnson, (Ill., Jan. 22, 1891), 26 N. E. Rep. 510.

When Child Will Be Deemed Sui Juris.—In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult. Tucker *v.* New York Central & H. R. R. Co,, 124 N. Y. 308.

Measure of Care Required of Child.—Ordinary care for his own safety is not necessarily the measure of diligence incumbent upon a child under 14 years of age; nor is such child bound, as matter of law, to anticipate negligence by others. The evidence showing that the boy in question was under 14 years of age, a request to charge the jury, which assumed him to be of the age of 14, was properly declined Georgia Midland & G. R. Co. *v.* Evans, 87 Ga. 673.

CAHILL

v.

CINCINNATI, NEW ORLEANS TEXAS PACIFIC R. CO.

(Kentucky Court of Appeals, December 10, 1891.)

Injury at Private Crossing—Negligence of Company in Failing to Give Signals at Public Crossing.—Persons lawfully using a private crossing over a railroad in the vicinity of a public crossing, are entitled to the benefit of signals required to be given at the latter; and for failure of the railroad company to give such signals at the public crossing, negligence as to persons injured at the private crossing will be imputed to it. Accordingly, a person at a private crossing, who has been accustomed to hear signals given for the neighboring public crossing, may rely upon the company's giving such signals in using his private passway over the track.

Contributory Negligence—Failure to Look—Absence of Direct Testimony—Question for Jury.—Where it is contended that a person injured at a railroad crossing was guilty of contributory negligence in failing to look for the coming train, and there is an absence of any direct testimony upon this point, it is the province of the jury to determine that question from the circumstances proved, for it is not to be presumed that a person recklessly imperiled his own life.

Same—Discovery of Danger by Those in Charge of Train—Failure to Avoid Collision.—Although a person injured at a railroad crossing may have been negligent in failing to look for the approaching train, yet, where it appears that the buggy in which she was riding could have been seen 400 yards from the crossing, the question is pertinent, and should be submitted to the jury, whether those in charge of the train could, by reasonable diligence, have discovered the danger in time to have prevented the collision.

Same—Evidence that Person in Another Vehicle Looked for Train.—In an action for injuries received at a railroad crossing, where it is contended that the plaintiff was negligent in failing to look for the approaching train, and there is no direct testimony as to whether this precaution was taken, it is error to refuse to permit a person who was riding in a buggy in the rear of the one occupied by the plaintiff, to testify that he, at a point 100 feet from the crossing, looked from his buggy along the track and could not see the train. Such evidence is competent as tending to show that when the plaintiff's buggy, being nearer the track than the witness, was within about seventy feet of the crossing, the train was not yet in sight and must have been more than 1,200 feet away, and, therefore, if running at the usual speed, it is questionable whether it would have struck plaintiff's buggy.

Negligence of Driver of Vehicle Not Imputed to Companion.—The negligence of the driver of a vehicle cannot be imputed to one who accepts his invitation to ride therein, in the absence of evidence that the invitation was accepted with knowledge that the driver was incompetent and unreliable.

APPEAL from Kenton Circuit Court.

Action to recover for personal injuries. Plaintiff appeals from a judgment entered upon a verdict directed for defendant.

Wm. Goebel, for appellant.

Chas. B. Simrall and *Simrall & Mack*, for appellee.

LEWIS, J.—The jury having, at conclusion of the plaintiff's evidence in this case, under instruction of the court, returned a verdict as in case of non-suit, she appeals. The circumstances under which the injury complained of was done are substantially as follows: Plaintiff, an unmarried woman, had started about 9 A. M. from the residence of her father, of whose family she was a member, to church in a buggy owned and driven by a young man, Henry Conrad, and was closely followed by her sister, also unmarried, and Jerry Conrad, in another buggy. The route they were going was along a private passway, which crossed defendant's railway track, **Case stated.**

and west of it intersected a turnpike road. The course of the passway was from the residence mentioned about southwest to a point a short distance from the railroad; thence northwest, making the angle at intersection acute, and rendering it necessary for those in the buggies to turn more than half around in order to see a railroad train approaching the crossing from the south. The railroad track was, for a considerable distance south of the crossing, straight, and in the opinion of some witnesses, a train coming from that direction can be seen 400 yards away from a point on the passway, 100 feet from the crossing. But the train which caused the injury was a passenger express, three hours behind time, and running unusually fast—according to the opinion of some witnesses, as much as sixty miles an hour, none of them putting it at less than forty-five miles. No signal of approach of the train to Cahill's crossing was given, nor as the evidence tends to show, was there any upon its approach to the public crossing south of and distant a half mile from the other. The injury was done in January, and, though the weather was not excessively cold, it was enough so, the ground being frozen, to require the buggy top to be raised, and the evidence tends to show Henry Conrad had on ear muffs and plaintiff wore a veil. The gait at which they were traveling was not fast, the horse going in a walk. But whether either Henry Conrad or plaintiff, before going on the track, looked or listened for a coming train, does not appear: for he was killed by collision of the buggy and train that took place, and she so seriously hurt that, as testified, her memory is blank about everything that took place during a period of time beginning when she left home that morning and continuing for days.

This court has expressly decided that failure of those in charge of a railroad train to give such signal as will be sufficient to apprise persons at or near a public crossing of its approach must be regarded as negligence. Railroad Co. *v.* Hoehl, 12 Bush (Ky.), 41; Louisville, C. & L. R. Co. *v.* Goetz, 79 Ky. 444, 14 Am. & Eng. R. Cas. 627. It has, however, been held that the same reason does not exist for giving signal and slackening usual speed of a train at a private crossing, and failure in that respect is not generally regarded negligence. Johnson *v.* L. & N. Co., MS. Op. 1883. But the evidence in this case shows that a signal, when given by steam whistle on approach of a railroad train from the south to the public crossing referred to can be distinctly heard at and even beyond Cahill's crossing. And thus arises a question not heretofore presented to or decided by this court, whether persons lawfully using

Question Presented.

a private crossing in the vicinity of a public crossing, are entitled to benefit of signals required to be given at the latter, and whether for failure to give them, negligence as to them should in any case be imputed to the railroad company.

In Shackleford *v.* Louisville & N. R. Co., 84 Ky. 47, 28 Am. & Eng. R. Cas. 591, it was said: "Railroad trains must give the customary signals at public places and public crossings; the failure to do so is negligence. But this is required for the safety of passengers, trainmen, and the public using, and who have a right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere." The same doctrine had been stated in the Hucker Case. The reason for that discrimination is that presence of a trespasser on a railroad track is not only likely to impede and sometimes endanger safety of moving trains, but, being wrongful and unlawful, those in charge cannot be fairly required or expected to anticipate and provide for it. Consequently the only duty a railroad company owes to such person is to use reasonable diligence to prevent injuring him when his actual peril is discovered in time to do so. But that rule cannot be properly applied in this case, nor was the precise question now before us settled or considered in the cases just cited. It here appears that Cahill's crossing was established, and the right to use it by those going to and from his residence secured, by express contract between the railroad company and his immediate vendor. Therefore neither plaintiff nor her companion, Conrad, was a trespasser when the collision occurred, nor had they assumed risks attending a trespass, but both had the legal right to go on the railroad track at that crossing. There is conflict of authority on the question; the doctrine of some of the courts being that only travelers on a highway or street approaching or using a crossing can complain of omission to give required signals, while by others it is held that all persons in the vicinity of a public crossing, whether intending to use it or not, are entitled to benefit of signals, and have a right to rely on them being given. However, as said by the editor of Amer. & Eng. Enc. Law, in a note, (volume 4, p. 917:) "Generally this conflict may be traced to the construction of particular statutory provisions. Sometimes it is due to radical difference of view among judges as to the purpose of statutory enactment regulating signals."

Negligence in failing to give signal — Person at private crossing.

There being no statute of this state on the subject, nor, for the reason mentioned, a decided weight of authority, one

way or the other, the question before us must be determined according to reason and analogy of the law, as was the original question of the duty of railroad companies to give signals for highway and street crossings. Although it may be regarded an unreasonable hindrance of regular and prompt movement of trains running on schedule time to require their speed slackened and signals given at every private crossing, however little used, it does not follow a railroad company is exempted from any reasonable duty to persons who lawfully go on its track at such place. On the contrary, it is bound to look out for presence of persons at an established and recognized private crossing, and use reasonable precaution and vigilance to avoid injuring them. And so they have the right to act upon the presumption the company will duly comply with every legal requirement that may affect them in the reasonable use of such crossing. Therefore, if a person of common prudence and intelligence, who distinctly and habitually hears signals of approach of railroad trains to a public crossing, that he knows it is both the duty and custom of the company to give, would ordinarily rely on such signals in the use of his own private crossing, then he should, in law as well as in fact, have benefit of them. Otherwise his would be the case of a person injured while in the reasonable exercise of a legal right, yet without remedy against the wrong-doer or person in fault. As a matter of fact, within common observation, persons living in the vicinity of a railroad generally keep informed about regular movement of trains, and those of them near enough to hear the customary sound of the steam-whistle for a public crossing do rely upon it as a signal by which to regulate use of their own private passway over it. And we see no reason why they may not rightfully and prudently do so; for nothing more is thereby exacted or assumed by them than simple performance by the railroad company of a legal duty already prescribed for safety of those using the public crossing that incidentally and naturally operates for their own. And when the legal obligation is coupled with customary performance of the duty of giving such signals, a double assurance is afforded that all who hear may rely on them; and in fact they are as implicitly, and may be as certainly and safely, relied on by those hearing them at a private, as at the public, crossing for which they are given. To so allure a person to go on the railroad track at his private crossing, and then exempt the company from liability for injuring or killing him upon the fallacious and deceptive theory that, in legal contemplation, signals, though inevitably heard beyond, are for the sole benefit of those at a public crossing, would

be without reason and justice. The law sets no such bounds to the liability of a person violating it, nor does it thus curtail the remedy of one injured by the violation.

The evidence in this case shows it was customary for signals to be given of approach of trains to the public crossing referred to, and that persons using Cahill's crossing were thereby enabled to tell about what time one going north would pass, and so avoid collision with it. In our opinion, failure of those in charge of the train in question to give the usual signal for the public crossing, if they did so fail, should be regarded as negligence of defendant as to plaintiff, and authorize recovery, unless she was guilty of contributory negligence that but for it the collison would not have occurred.

Although the burden of showing contributory negligence is always on the defendant, and the plaintiff in this case was not, in order to recover, bound to disprove it, still it was competent for the lower court, on the motion for a peremptory instruction, as it is now necessary for this court in revising the judgment, to determine whether that defense was so fully developed by her own evidence as to justify sustaining the motion. It is not contended the plaintiff was negligent in any respect, except failing to look for a coming train before going upon the railroad. Whether either she or Henry Conrad did so look could not, for the reason before indicated, be shown by direct testimony. Therefore it was the peculiar province of the jury, not of the court, to determine that question from facts and circumstances proved; for, whatever may be the rule elsewhere, it has been definitely settled by this court that it is not to be presumed, in the absence of evidence as to the care exercised by a person injured or killed on a railroad where he had the right to be, that he recklessly or carelessly imperiled his own life. Louisville, C. & L. R. Co. *v.* Goetz. Moreover, even if plaintiff was guilty of negligence, considering the long distance, 400 yards, the buggy could have been seen from the train, the question was pertinent, and ought to have been submitted to the jury, whether those in charge did or could, by reasonable diligence, have discovered the danger of a collision in time to prevent it, by checking the train or blowing the whistle. But to decide that failure of a person to look along a railroad before attempting to cross it is, under all circumstances and necessarily, negligence, would be arbitrary and without reason; for there may be evidence sufficient to satisfy a person of ordinary carefulness the track is clear without taking that precaution, as when he knows it is

Contributory negligence—Failure to look.

not usual train-time, and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, cannot, upon principle, be regarded as negligent, even if he does fall short of the measure of vigilance needed to prevent being injured by a passenger train running hours behind time at an extraordinary rate of speed, and without any signal of its approach. In that connection, it was error in refusing to permit Jerry Conrad to testify that he, at a point 100 feet from the crossing, looked from his buggy south along the railroad, and could not see the train. The evidence was competent because it tended to show that when Henry Conrad's buggy, being nearer than the other, was within about 700 feet of the crossing, the train, not yet in sight, must have been more than 1,200 feet away, and therefore, if running at the usual speed, it is questionable whether it would have struck the buggy.

Evidence that another looked for train.

Another question argued by counsel is whether negligence on the part of Henry Conrad, assuming it to be proved, can be imputed to plaintiff in bar of recovery. The general rule, as settled by this court, is that when an injury is occasioned by concurrent negligence of two persons the fault of one is no excuse for the other, but both are liable to the party injured. Danville Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119; Railroad Co. *v.* Case, 9 Bush, (Ky.) 728. In both those cases the plaintiff was a passenger in a public conveyance. But the conditions upon which contributory negligence of one of such persons can be imputed to the plaintiff, in an action against the other, as held in the latter case, are that he must have then been the agent or servant, or subject to the government or control, of the plaintiff. It does not, therefore seem to make any difference in such case whether the party injured was at the time a passenger in a public conveyance, paying his fare, or riding in a private vehicle, free of charge, at invitation of the owner and driver; but the true test is whether his relation to the person whose negligence is sought to be imputed to him was such as would have rendered him liable in case another than himself had been injured by such concurrent negligence; for to defeat an action of a party injured by showing contributory negligence of another, or to render him liable for that other person's negligence, not being himself in fault, either the maxim *qui facit per alium facit per se* must apply,—that is, the relation of master and servant or principal and agent must exist,—or else that they were engaged in a joint enterprise, whereby

Imputed negligence.

mutual responsibility for each other's acts existed, which was clearly not the case.

Robinson *v.* New York Cent. & H. R. R. Co., 66 N. Y., 11, was the case, like this in every respect, or a female who, while riding in a buggy at invitation of a young man, the owner and driver, was injured by collision with a railroad train, and, in discussing the same question we are now considering, CHURCH, C. J., said: "I am unable to find any legal principle upon which to impute to the plaintiff the negligence of the driver. * * * The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach, or even a train of cars, providing there was no negligence on account of the character or condition of the driver, or of the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible."

Masterson *v.* New York Cent. & H. R. R. Co., 84 N. Y. 247, 3 Am. & Eng. R. Cas. 408, was the case of a person being invited to ride in a private vehicle by the owner and driver, and losing his life while the vehicle was crossing the defendant's road, where it was left in a dangerous condition. And in St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 23 Am. & Eng. R. Cas. 269, the plaintiff, a minor under sixteen years of age, yet fully able to take reasonable care of her safety, was injured by collision between a wagon in which she was riding with her father, owner and driver, and the defendant's car. In both cases it was held that the same principle governed as in case of a passenger in a public vehicle, and that, as the driver in neither case was the servant or agent of the plaintiff, the latter could not be held responsible for negligence of the the former.

The case of Dean *v.* Pennsylvania R. Co., 129 Pa. St. 514, 39 Am. & Eng. R. Cas. 697, cited by counsel, is when, under the particular circumstances recited, a person riding by invitation of the owner and driver of a private vehicle was held to have been guilty of contributory negligence. It is true a passenger in a public, as well as private, vehicle may, by his own negligence, contribute to its collision with another vehicle, whereby he is injured. But the question before us is not whether the plaintiff in this case was negligent, but whether the assumed negligence of the owner and driver of the buggy she was in can be imputed to her. The distinction is recognized, even in the case cited, and, although it is there said a person carried in a

private conveyance is responsible for his own negligence, yet it is distinctly held that negligence of the driver cannot be imputed to him, any more than that of a common carrier can be to his passenger.

It seems to us there is no authority or sound reason for imputing to the plaintiff in this case the negligence of Henry Conrad, if he was guilty of any, in the absence of evidence that she voluntarily accepted his invitation knowing him to be incompetent and unreliable, or that she, instead of him, did actually control and direct the movement of the buggy.

Wherefore the judgment is reversed for a new trial consistent with this opinion.

Who Can Complain of Failure to Give Crossing Signals.—See Spicer *v.* Chesapeake & O. R. Co. (W. Va.), 45 Am. & Eng. R. Cas. 28, and cases collected in note, 36; Shoebrink *v.* Canada Atlantic R. Co. (Ont.) 37 *Id.* 462.

Injury at Crossing—Imputing Negligence of Driver of Vehicle to Passenger.—See *post*, Louisville, N. A. & C. R. Co. *v.* Creek, and note.

GRATIOT

v.

MISSOURI PACIFIC R. CO.

(*Missouri Supreme Court, Division No. 2, May 19, 1891.*)

Injury at Crossing—Excessive Speed—Negligence per se.—It is negligence *per se* for a railroad company to run its train through a city at a greater rate of speed than that allowed by the ordinances of such city; and if, while so running its train at excessive speed, a person is run over and killed at a crossing, the negligence of the company will be considered as the direct cause of the injury.

Contributory Negligence—Duty of Traveler to Look Both Ways.—A person about to cross a railroad track at a public highway is not required constantly to look in both directions in which trains might approach.

Same—Traveler Seeing Engine at a Distance—Mistaken Belief That It Is Standing Still.—Whether one who, on approaching a railroad crossing, sees an engine at a distance of half a mile, and proceeds to cross the track under the mistaken belief that it is standing still upon a side track, and is struck and injured by such engine which was in reality moving towards him, is guilty of negligence, is a question for the jury.

Instructions as to Contributory Negligence—Sufficiency of Charge.—In an action for an injury so received, it is sufficient if the court instructs the jury that it was the plaintiff's duty to exercise such care as an ordinarily prudent and careful person would have exercised under like circumstances, and if the collision was the result of the joint negligence of both plaintiff and defendant, then the plaintiff could not recover; and that if the plaintiff approached the crossing regardless of his own safety but trusting to the obligation of the defendant to warn him, and, by reason of his failure to pay attention, was injured, then the verdict should be for the defendant.

Evidence of Negligence in Running Train—Sufficiency of Allegation in Petition.—An allegation, in plaintiff's petition, that his injuries were sustained "through the negligence and carelessness of the defendant's agents and servants while running controlling, and managing this locomotive engine and train of cars", is sufficient to admit proof of negligence in running defendant's train.

Excessive Damages for Personal Injuries.—A verdict of $10,175 to a physician, 60 years of age, who earned $2,500 a year from his profession, for injuries which made him a physical wreck and which disabled him from practicing his profession to some extent, is not excessive.

APPEAL from St. Louis Circuit Court.

B. Pike for appellant. *Davis & Davis, A. R. Taylor,* and *James P. Maginn,* for respondent.

THOMAS, J.—This is an appeal from the judgment of the circuit court of the city of St. Louis against the defendant corporation for the sum of $10,175 for personal injuries. The petition charges three distinct acts of negligence as causes of the injuries: (1) That the injury occurred within the limits of the city of St. Louis, and that defendant's train that caused it was running at a rate of speed greater than six miles an hour, in violation of a city ordinance; (2) that defendant's agents in charge of the train at the time failed to ring the bell of the engine constantly, as required by the city ordinance; and (3) that defendant's agents negligently ran and managed the train. The answer contained a general denial and a plea of contributory negligence. Case stated.

1. It is urged with much earnestness and ability that the trial court committed error in overruling defendant's demurrer to the evidence. It is claimed that the evidence discloses contributory negligence on the part of plaintiff which precludes his recovery. Facts reviewed. There is no disagreement between counsel as to the principles of the law of negligence and contributory negligence, bnt they disagree, and disagree radically, as to the application of these principles to the facts of this case. The only question touching the phase of the case under review, therefore, for us to determine is whether, upon the admitted or indisputably proved facts, the court can, as a matter of law, declare that plaintiff has no case entitling him to recover. The facts are these:

The injury occurred at Campbell's crossing, 150 or 200 yards west of Cheltenham, a station on defendant's road, about five miles from the Union Depot, and within the limits of the city of St. Louis, 20 or 22 minutes to 10 o'clock on the 19th day ofAugust, 1887. Howard, another station on defendant's road, is about 1,000 yards east of this crossing; and near this station are the Howard Fire-Brick Works and the

smelting works. The Manchester road runs near to and parallel with the railroad a mile and a half north of the crossing in question. This goes up an elevation west of Cheltenham, and there is a cut of 12 or 15 feet deep where the Campbell road crosses the railroad. The Campbell road makes a right angle with the Manchester road; the latter being on the west side of the railroad, and the former running south from it. After getting on to the Campbell road one cannot see the railroad east until he comes within a few feet of the railroad track. The train that caused the injury was the morning mail, and its schedule time for leaving the Union Depot was 9 o'clock A. M., but the morning of the accident it was 25 minutes late. The plaintiff is a doctor, and lives at Cheltenham. That morning he was on the road in his phaeton, drawn by a single horse. He knew the time this train ordinarily passed Cheltenham, which he says was about 10 minutes after 9. He was nearing this crossing about 20 minutes before the accident, but would not cross then. He went over to Mrs. Given's, 150 yards distant, to see a clock and post himself as to the time. It was then 23 minutes after 9. He did this in order to be sure he could have the right of way. He drove to and turned into the Campbell road, and halted his horse, he says, within five or six feet of the track, in order to ascertain whether a train was approaching. He could see west a considerable distance, and from where he stopped he could see the railroad track through the cut there to the east 800 or 1,000 yards. He heard a whistle, which he took to be between Howard station and a bridge on the road east of Howard, some 1,200 or 1,400 yards from where he was. He raised up in his buggy, looked to the eastward, and saw an engine about 800 yards away, which he took to be a switch engine on the track of the smelting works there situated. He thereupon proceeded to cross the track, and when his horse got his fore feet on the track the engine struck him, knocking the horse off, turning the buggy over, throwing plaintiff to the ground and injuring him seriously. The train was run at a rapid rate. Its speed was variously estimated, some witnesses fixing the maximum at 60 miles, and some the minimum at 30 miles, an hour. The plaintiff thinks it was very little over half a minute from the time he saw the engine 800 yards east of him before it struck him. He says he stopped a period of three to five minutes before he attempted to cross the track; but he is evidently mistaken about this, for if the train was running at the minimum rate of speed fixed by the witnesses, it would have reached him from where he saw it in one minute. He must be very near accurate in placing the time

of the approach of the train at half a minute after he saw what he supposed to be a switch-engine. After seeing this engine he started across the track, and did not look any more to see if a train was coming. He heard no bell nor whistle as the train approached, except just at the time of the collision. He says he did not see the train at all before it struck his horse, but there was a "waver" on his spectacles that indicated to him that a train was coming. He undertook to pull his horse, but it was too late. The crossing in question was a public crossing. The agents in charge of the train testified that the bell was rung all the way from the Union Depot to the place of the accident, and the whistle was blown at stations and crossings. The engineer discovered plaintiff when within 150 feet of him, and then it was impossible to stop the train in time to avoid the collision. It is conceded that the engine plaintiff saw was the engine that caused the injury, and we think it conclusively appears from the evidence that plaintiff was honestly mistaken about it, he supposing it was a switch engine at the smelting works, as he testified. The train did not stop at Howard or Cheltenham. The ordinances of the city mentioned in the petition were read in evidence.

The proof is unquestioned that the train was running at a greater rate of speed than six miles an hour, in violation of the ordinances of the city, and this has been held by a long line of decisions of this court to be negligence *per se*. Kellny *v.* Missouri Pac. R. Co., 101 Mo. 67, 43 Am. & Eng. R. Cas. 186, and cases cited; Murray *v.* Missouri Pac. R. Co., 101 Mo. 236. It was urged in argument that this ordinance was an unreasonable restraint upon defendant's management of its business, and that the traveling public would not tolerate six miles an hour a distance of several miles for a train the character of this. No such issue was made by the pleadings, evidence, or instructions, and that question is not presented by this record for our determination. There can be no question that the collision would not have occurred if the defendant's agents had been running the train at the maximum speed allowed by the ordinance. The plaintiff traveled five or six feet after he saw the train, and before it reached him, when it was running certainly at 30, and probably at 40 or 50, miles an hour; and of course it takes only a mathematical calculation to show that he could have gone from five to eight times that distance if the train had been running at the rate of 6 miles an hour, and this would have put him across the track, and out of danger. We take it, then, that the defendant was guilty of negligence that directly caused the injury.

Negligence of defendant—Excessive speed.

This brings us face to face with the question: Was plaintiff so clearly guilty of contributory negligence that we can say, as a matter of law, that he cannot recover? We think not. It is claimed that it was plaintiff's duty, in approaching and crossing defendant's track, to look constantly both ways. It is said one before crossing a railroad is bound to stop, look, and listen, but we know of no rule of law requiring a party to constantly look even one way, and especially none requiring him to constantly look both ways. We have to deal with man as we find him. When we get information that fixes upon our minds an impression that a certain state of facts exists, we act upon that impression. We satisfy ourselves that we are right, and then go ahead. At least, ordinarily prudent men do this. Dr. Gratiot looked and saw an engine half a mile away that he supposed was on a switch, and of course was not approaching him at all. He accepted this as a fact, and acted on it; and there would be no more reason in requiring him to look constantly up the track to learn whether he was mistaken about this supposed fact than to require men in their multitudinous affairs to hesitate at every step, and question not only the correctness of their judgment, but even the truth or falsity of what seem to be the facts that environ them. It would be a great boon to humanity if no mistakes could occur, but to require men to hesitate to act upon what seems manifest to their eyes and ears, simply because it is possible that they may not have seen or heard the fact as it is, would virtually stop business and commerce.

Plaintiff's negligence—Duty to look.

But, says counsel for defendant, plaintiff saw the identical train that injured him, and his mistake in regard to it cannot relieve him of responsibility for the damage he suffered. We do not concur in this view of the matter. That plaintiff's mistake was an honest one there is no question. We do not pretend to say that a man might not make a mistake that would not relieve of responsibility. A man may be guilty of making a mistake negligently. Take as an illustration, the instance when one seeing a train approaching, and, thinking he can cross in front of it, attempts to cross, and is injured, as was the case in Moody *v.* Pacific R. Co., 68 Mo. 470, he and those representing him cannot be heard to complain. Moody thought (and no doubt honestly thought) the train he saw was the regular mail, and would stop, but yet he knew it was a train approaching him, and he thought he could make it across the track in front of it, and attempted to cross, and was killed. This was held to be negligence on his part

Plaintiff's mistake in regard to train.

which precluded his representative from recovering. But even in such case this court held in Petty *v.* Hannibal & St. J. R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618, that it was not negligence *per se* when a party supposed the train was more than 80 rods from the crossing, though he was mistaken about it, to attempt to cross.

The case of Bonnell *v.* Delaware, L. & W. R. Co., 39 N. J. Law, 189, is precisely in point on the question under discussion. There the plaintiff, when about 100 yards from the railroad, looked and saw a train with the rear towards him, and was deceived by appearances, supposing it was going away from the crossing. He was driving a wagon, and proceeded to cross the track without looking any more. Some men saw his peril and signaled to him, but he misconstrued the signal, and was injured. The court held it a proper case to go to the jury. SCUDDER, J., speaking for the whole court, said: "Where there are doubtful and qualifying circumstances, the question of negligence or want of proper care is a matter of ordinary observation and experience of the conduct of men, and, as such, must be left to the jury, as being within their legal province. The law has said in these cases that the plaintiff shall have the judgment of twelve men, and not the opinion of one man. * * * The fact upon which the defendant mainly relied in this case was that the plaintiff did not look up the track as he approached and before he attempted to cross it. But the plaintiff had looked when about one hundred yards from the crossing, and saw, as he supposed, a train going in the opposite direction, with the rear towards him. He was not required by any legal rule to look continually until he crossed the track. A man of prudence might have received a fixed impression from the appearance of the train that it was going away from the station. Having that belief, his further attention may have been called off by the actions of the men near the station, who were gesticulating, which he misunderstood. * * * It was for the jury to weigh all these facts, and say whether his mistake and consequent feeling of security were unreasonable, and manifested a want of proper care." In the language of Lord COLERIDGE, we think that opinion contains excellent sense, and is elegantly expressed. The principle announced is sound. It is a familiar rule, also, that where a party is placed in a position of peril, or is frightened, a mistake of facts excuses him. Keim *v.* Union R. & Transit Co., 90 Mo. 314, and cases cited; Beach, Contrib. Neg. pp. 198, 201. As was said in the Bonnell Case, *supra*, so we say in this case: It was for the jury to weigh all the facts, and say whether plaintiff's mistake and consequent feeling of

security were unreasonable, and manifested want of proper care. It is not necessary for us to decide that he was not guilty of negligence in going upon the crossing to sustain the ruling of the trial court in overruling the demurrer to the evidence. Before the court is justified in taking a case from the jury the facts must be proved in the first place; and then, in the second it must appear that only one fair inference can be drawn from the facts thus proved. In cases of this character the party has a right to demand a jury to pass not only on the facts, but to determine also what inferences shall be drawn from the facts found; that is, determine the ultimate facts in issue, where men of ordinary ability and judgment might honestly differ. Tabler *v.* Hannibal & St. J. R. Co., 93 Mo. 79, 31 Am. & Eng. R. Cas. 185; Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, 31 Am. & Eng. R. Cas. 221; Keim *v.* Union R. & Transit Co., 90 Mo. 314.

2. It is contended that the court erred in authorizing the jury to find for the plaintiff if they found that defendant's agents were guilty of negligence in moving and managing the train, because there was no proper averment in the petition to support such a finding. There is an independent allegation in the petition that plaintiff sustained the injuries complained of "through the negligence and carelessness of defendant's agents and servants while running, controlling, and managing its locomotive engine and train of cars." We have had occasion to examine this question in the cases of Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491, and Hanlon *v.* Missouri Pac. R. Co., 104 Mo. 381, submitted at the same time this was, and we held in those cases, as we again hold in this, that this averment is sufficient to authorize proof of negligence in running the trains. There is another reason, however, in the case now in hand, why this point will not avail defendant, and that is, it was guilty of negligence directly causing plaintiff's injury in running its train from 30 to 60 miles an hour in violation of the city ordinance, and it is utterly immaterial whether it was guilty of negligence in any other form or not; and yet on this issue there was evidence of recklessness in the management of the train in question. It must have been running at a break-neck speed. The weight of the evidence is that it was running from 40 to 60 miles an hour. Plaintiff saw it, and in the twinkling of an eye, almost, "a waver," and the crash came. The jury might very well find it to be carelessness to go at such a rate, in such a place, under such circumstances, flying by stations and over crossings without halting, aside from the requirement of any ordinance or statute.

Negligence in managing train—sufficiency of petition.

3. It is again insisted that the court erred in submitting the question of plaintiff's contributory negligence to the jury in the instructions given, and that certain instructions prayed by defendant on that question ought not to have been refused. The court in substance told the jury in its instructions Nos. 1, 2 and 3 that plaintiff was entitled to recover, if he was himself exercising that degree of care and prudence that an ordinarily careful and prudent person under like circumstances would have exercised, and that the collision was caused by the negligence of defendant (1) in moving the train at a greater rate of speed that six miles an hour; (2) in failing to constantly sound the bell; or (3) in failing to exercise that degree of care and prudence in the handling and managing of the train which an ordinarily careful and prudent person, engaged in like business, would have exercised. As we have remarked, it is immaterial in this case what the court says about the sources of defendant's negligence. It being conceded that it was guilty of negligence *per se* in running the train in violation of the city ordinance, the only question of fact that the jury had to deal with and determine was whether plaintiff was guilty of contributory negligence, and on this question the court instructed the jury as follows: "(4) And, on the other hand, it was the duty of the plaintiff, in crossing or attempting to cross the defendant's railroad track, to have exercised that degree of care and prudence that an ordinarily careful and prudent person under like circumstances would have exercised; and a failure to exercise such a degree of care and prudence would render him guilty of negligence." "(6) But although the defendant was guilty of negligence in running its trains at a greater rate of speed than six miles an hour, and although you may believe from the evidence that the defendant was also guilty of negligence, as that term is explained in either the second or third of the foregoing instructions, and although you may believe from the evidence that such negligence of the defendant contributed to cause the collision in question, yet if you also believe from the evidence that the plaintiff was also guilty of negligence, as that term is explained in the fourth instruction foregoing, and that such negligence of the plaintiff directly contributed to cause said collision,—that is to say, if you believe from the evidence that said collision was the result, not of the negligence of the defendant alone, but of the joint negligence of both plaintiff and defendant,—then the plaintiff is not entitled to recover, and your verdict should be for the defendant. (7) If the jury find from the evidence that the plaintiff approached the railway crossing with his horse and

Instructions submitting contributory negligence to jury.

buggy without paying any attention to his own safety, but trusted to the obligations imposed upon the railway company to warn him of an approaching engine and train, and was injured by reason of his failure to so pay attention, they will find a verdict for the defendant."

The defendant asked the court to instruct, and the court refused to instruct, the jury that, unless the plaintiff carefully and constantly looked and listened for a train as he approached and went on to the crossing, he could not recover; or, if he attempted to cross before he had ascertained whether a train was approaching, or if he saw a train which he supposed to be a switch-engine, and then paid no further attention to ascertain whether such engine was approaching in fact, he could not recover.

We will not say anything further in regard to the mistake plaintiff made. We think we have said enough to show that the part of the charge prayed by defendant as to that was properly refused. Nor will we add anything to what has already been said about the duty of plaintiff to constantly look and listen, or to look and listen after he honestly supposed he knew the facts of the situation. Defendant urges that the instructions it asked ought to have been given because the instructions given are not specific enough in informing the jury what contributory negligence is. We differ with defendant's counsel in this regard. In the fourth instruction the court defines negligence to be a failure to exercise that degree of care and prudence that an ordinarily careful and prudent person, under like circumstances, would exercise. Then in the sixth instruction the court says that, although defendant was guilty of negligence, yet if plaintiff was also guilty of negligence, as defined by the court, and that such negligence directly contributed to cause the collision,—*i.e.*, if "the collision was the result, not of the negligence of the defendant alone, but of the joint negligence of both plaintiff and defendant,"—then the plaintiff was not entitled to recover. This is terse, vigorous English, and we do not see how the court could have made it more plain to the jury what was meant by contributory negligence of the plaintiff that would defeat his claim for damages. Negligence is admirably defined by the court, and the definition given conforms to the law. Beach, Contrib. Neg. §§ 2, 3; Tetherow *v.* St. Joseph & F. M. R. Co., 98 Mo. 74; Wilkins *v.* St. Louis, J. M. & S. R. Co., 101 Mo. 93. And then the court tells the jury in an explicit manner when negligence is contributory. The court, in this case, could not have told the jury that plaintiff was negligent if he failed to look and listen. He did both. If he was negligent at all, it was be-

cause he failed to exercise proper care in verifying his impression about the engine he saw being a switch-engine. It is a question of fact for the jury, and not of law for the court, to determine whether plaintiff should, under the circumstances, have looked again. It was, we think, properly left to the jury to say whether plaintiff's conduct conformed to that of an ordinarily careful and prudent man. Jurymen are taken from the body of the people, and they are supposed to be men of ordinary care and prudence, and it is peculiarly within their province to determine what care and prudence dictate under given circumstances. But, if anything was lacking in the definition of plaintiff's duty under the circumstances, it was supplied by the seventh instruction, *supra*, which was given at the instance of defendant.

We hold that the instructions, taken as a whole, were exceptionally clear, and presented the issues to the jury in a very concise and yet lucid manner. Under these instructions the jury in their verdict negatived the contributory negligence of the plaintiff, and in this we think they were supported by the evidence.

4. Defendant contends, in the last place, that the verdict of $10,175 is excessive to that degree that it must have been the result of corruption, passion, or prejudice on the part of the jury. We confess that the sum awarded plaintiff is large, but we do not think it so excessive that we ought to interfere. The $175 we presume was allowed for the damage to the horse and buggy, and the $10,000 for the injury to plaintiff's person. The evidence tends to show that the plaintiff, after the accident, was found lying on the ground in an insensible condition; that he came to in a short time: that he was terribly scarred and bruised about the face, his nose broken, three of his teeth knocked out, three of his ribs broken near the spine; that there was partial paralysis on the left side of his face; his left side and spine were injured from the shock; that his hip on the left side was injured, and there was constant pain on that side, and that he was lame at the time of the trial, which occurred in April, 1888, the accident occurring in the previous August; that plaintiff was sixty years old; that the injuries were probably permanent, and disabled him from practicing his profession to some extent, his income previous to the accident being about $2,500 per annum. It is evident plaintiff's injuries have wrecked him physically. The shock received under the circumstances of this case, in connection with the injuries inflicted, must of necessity leave its impress for life upon a man of the plaintiff's age. What damage he ought to receive must be left somewhat to the jury. There

Damages not excessive.

is no fixed standard by which to estimate damages of this character, and it is unfortunate there is none. This is an imperfection in the administration of law, but it is an imperfection that inheres in all human institutions. We cannot help it if some juries place a high, while others put a low, value on life and limb. All the courts can do is to interfere with the verdicts of juries when it is manifest that they are the result of corruption, prejudice, or passion. We cannot say that of the verdict in this case. It was for the jurors to say what damage the plaintiff ought to have. They fixed the amount at $10,175, and under the facts of the case we do not feel authorized, and we have no disposition to interfere. Porter *v.* Hannibal & St. J. R. Co., 71 Mo. 66, 2 Am. & Eng. R. Cas. 44; Dougherty *v.* Missouri Pac. R. Co., 97 Mo. 647, 37 Am. & Eng. R. Cas. 206; Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168; Sheehy *v.* Kansas City R. Co., 94 Mo. 574, 32 Am. & Eng. R. Cas. 233.

Judgment affirmed. All concur.

ON REHEARING.

THOMAS, J.—The questions decided in the foregoing opinion are of such gravity and frequent occurrence that we have gone fully over the same ground, on the motion for rehearing. The able counsel for defendant prepared and printed an elaborate argument in support of this motion, and has displayed great learning and industry in collecting and arranging the authorities, and thereby the task of reinvestigation was made comparatively light for the court.

1. It is assumed in the motion for rehearing that we decided (1) that the plaintiff was not guilty of contributory negligence; and (2) that he did not make the mistake negligently. We decided neither. We simply held that there was some evidence from which the jury might fairly infer that plaintiff exercised ordinary care in crossing the track, and that, under the facts of the case, it was a question for the jury whether his mistake, and consequent feeling of security, were reasonable.

Points decided.

2. Speaking of what was said in our opinion on the question of plaintiff's mistake, defendant's attorney, in his argument, says: "The standard of judgment set up in this case should be universally applicable, for the law is no respecter of persons; but, with due deference, we submit that, in a suit against a railroad company, the honest mistake of its employes will never be accepted as sufficient to relieve it from liability. We know the court has meant nothing of the sort, but it has, none the less, set up a double and ranging standard of

When mistake will excuse negligence—Rule as to employes.

duty, making one requirement of members of the general public, and a different and far higher requirement of railroad men." This is a very grave charge, if true. Counsel contends that he is justified in making this charge by a reference to the varying standards announced in Donahue *v.* Wabash, St. L. & P. R. Co., 83 Mo. 543; Werner *v.* Citizens' R. Co., 81 Mo. 368; and Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475—on one side, and the case at bar on the other. In the Isabel Case "the engineer saw what he honestly took to be a dog on the track; it was a child." The trial court instructed the jury that if they found that the engineer, "by the exercise of ordinary skill and caution, might have observed the child on the railroad track, and recognized him as an infant, in time to stop the train before it reached and ran upon him," then the corporation was liable. This court approved the instruction. The jury found the fact, and the court declared the law. In the Werner Case, a "street-car driver saw what he honestly took to be a bag of oats or bunch of hay upon the track. It proved to be a prostrate man." The court again instructed the jury that if the driver of the car "by the exercise of ordinary care and prudence, might have ascertained that the object he saw lying in the track was a human being, before he ran over it, and might have stopped the car and avoided running over the deceased," the corporation was liable. The jury again found the fact, and the court declared the law. In the Donahue Case a child was killed, and the court told the jury: "If the injury of the child could have been avoided after the employes learned of the danger in which the child was or might have learned of his dangerous situation by the use of reasonable diligence," then the railroad company was liable. Here, likewise, the jury found the fact, and the court applied the law. In none of these cases did the court say that defendant's mistakes were negligent as a matter of law. In each case it was distinctly left to the jury to find whether there was negligence or not. The court did not assume that duty. Nor in the case at bar did the court instruct the jury that plaintiff's mistake excused him, but the court did instruct that, if plaintiff was guilty of contributory negligence in crossing, he could not recover. As in the other cases, so here, the jury decided the fact; the court, the law. There is a marked difference, however, in the cases cited and the one under discussion. The street-car driver in the Werner Case and the engineer in the Isabel Case saw something on the track, and they knew that anything in that position was dangerous to the life and property under their charge. Hence if they had not been mistaken, but had there

been in fact a sack of oats on the track in one case, and a dog in the other, they would have been guilty of negligence, even recklessness, in taking no steps to guard the cars under their control from danger. Not so with Dr. Gratiot. If he had made no mistake, that is, if the engine had been in fact what he supposed it was, as to him it would have been perfectly harmless. This, we take it, sufficiently disposes of the argument that this court applies one standard of duty to railroad corporations and another to the general public. The same rule is applied, and ought to be applied, to both. We did not say, nor do we now say, that a mistake excuses a man in all cases and everywhere, nor do we say that a mistake will not excuse him in any case or under any circumstances.

Instructions as to contributory negligence—Questions of law and fact.

3. There are two contentions of defendant that we will consider together: (1) That the evidence so clearly shows contributory negligence on plaintiff's part that the court, as a matter of law, ought to have declared that he could not recover; and (2) that, conceding the facts of the case were of such a character as to authorize the submission of the question of plaintiff's negligence to the jury, yet the court ought to have told the jury what facts, if proved, would have constituted negligence.

If we understand the second contention correctly, it is that the court, in its instructions, ought to have informed the jury what a man of ordinary prudence would have done at the time and place of this injury; that simply telling the jury that "it was the duty of the plaintiff in crossing, or attempting to cross, the defendant's railroad track to have exercised that degree of care and prudence that an ordinarily careful and prudent person, under the circumstances, would have exercised, and a failure to exercise such degree of care and prudence would render him guilty of negligence," and that he could not recover "if he approached the railway crossing with his horse and buggy, without paying any attention to his own safety, but trusted to the obligations imposed upon the railroad company to warn him of an approaching engine and train," was not enough.

It seems that the question of demurrer to evidence has been so often before the English and American courts, and has been so ably and exhaustively discussed by the courts and text writers, especially in the last 25 years, that we ought ere this time to have some reliable guides; but we must confess the question is apparently involved in as much difficulty as ever, and in an especial manner do we find a great contrariety of conflicting opinions on what may aptly be termed

"the law of the railroad crossing." The difficulty does not lie in the formulation, but application, of general rules. That contributory negligence of the injured party, with but few exceptions, will defeat a recovery, and that a party is guilty of contributory negligence when he fails to conform to what the law requires of him, or to what a man of ordinary prudence would usually do under the same circumstances, are axioms of the law. Thus far all is easy, but when we enter upon an inquiry into what men of ordinary prudence would do, under given circumstances, the divergence of judicial opinion begins. The adjudged cases not only show that the courts and judges have been and that they are now divided as to what ordinary prudence is, but also as to who shall determine when a man has exercised ordinary prudence in a concrete case. An effort has been made to find and mark the line where the province of the court ends and that of the jury begins, but it has, in a large degree, been fruitless. Much of the difficulty and confusion involved in the discussion of the subject of negligence and contributory negligence has grown out of a desire on the part of the courts to lay down abstract rules touching them, and a failure to make proper distinctions between a question of fact and a question of law. Negligence results from a violation of duty. If the duty be prescribed by law, its violation is negligence *per se*, and the court is bound to so declare it. But whether A. B. violated such a duty is always a question of fact. If the duty be not prescribed by law, then the question whether its violation is negligence is one of fact. Of course, we make a distinction between what the positive law requires and what prudence requires. The law cannot prescribe what men shall do, except in a comparatively few cases. In the majority of cases the law gives no specific instructions, but it requires every one to exercise ordinary prudence in his dealings with others. In those cases where the law gives no specific directions as to conduct, the question whether A. B. was guilty of a violation of duty, and hence guilty of negligence, is always a question of fact; the law neither prescribing the standard by which to measure A. B.'s conduct nor determining what his conduct was. And here again it is important to note a distinction between the capacity in which the court acts in determining and declaring a fact and the law. Our meaning can be better understood by illustrations. The court declares, as a matter of law, that the running of a train at a greater rate of speed that that prescribed by ordinance is negligence, and, as a matter of fact, that A. B. ran a train at a greater rate of speed than authorized by ordinance. The law never declares

that A. B. violated the ordinance, but the court, sitting as a trior of the fact, does. In other words, the court, sitting as a jury, finds and declares that A. B. violated the ordinance, and then, as a court administering the law, declares that A. B. was guilty of negligence. Take a case where the law has not prescribed what a party shall do, except that he shall be ordinarily prudent. The law has not prescribed the speed of trains outside of cities and towns, and not always in them. Hence in this class of cases there are two questions of fact to be determined: (1) What is an imprudent speed of a train? (2) Did the party charged run the train at this imprudent speed? The law does not require a party approaching a railroad to stop, look, and listen, but it does require him to exercise ordinary prudence. When A. B. crosses the track, therefore, two questions of fact must be determined: (1) What did ordinary prudence require him to do? and (2) did he come up to the standard of ordinary prudence? "There is no doubt that, where it appears beyond controversy that a failure to stop, look, or listen was a proximate cause of an injury, the courts will hold such failure contributory negligence as a matter of law. Schofield *v.* Chicago, M. & St. P. R. Co., 114 U. S. 615, 19 Am. & Eng. R. Cas. 353; Hixson *v.* Railroad Co., 80 Mo. 335. But this is a very different matter from holding a failure to stop, look, or listen negligence *per se*, sufficient to bar a recovery. In the one line of cases, it is properly held that a failure to stop, look, or listen was negligence, as a matter of law, upon the undisputed facts, because ordinary care required the precaution, and the failure to take it was a proximate cause of the injury that followed. In other words, there is a difference between negligence *per se*, without regard to the surrounding circumstances, and negligence as a matter of law, in view of all the circumstances." Note 2, p. 72, 4 Am. & Eng. Enc. Law. This seems to be a refinement without substantial basis; a distinction without a difference. It seems, at first blush, to be somewhat ambiguous. What is the difference between negligence *per se* and negligence "as a matter of law, in view of all the circumstances?" The ambiguity, however, disappears by putting the proposition in another form, and in a form, too, which does not change its significance. Negligence, "as a matter of law, in view of all the circumstances," is simply negligence as a matter of fact under the law, in view of all the circumstances, in a concrete case. That is to say, the court, sitting as a jury, finds the fact of negligence from all the circumstances, and then declares the law upon the fact thus found. That the fact of negligence may be admitted or may clearly appear from undisputed facts does not

render it any the less a fact as contradistinguished from law, and, and when the court finds and declares it, it proceeds as a jury, and not as a court. Sometimes negligence is called a mixed question of law and fact. This is strictly not an accurate statement, but misleading. In every concrete case there is a question of fact and a question of law, but the fact is an unmixed fact, and the law unmixed law. Simply because the court as a jury finds the fact, and the law is applied by the same court as a court to the fact thus found, does not make them a mixed question of law and fact. In that line of cases where the law does not prescribe what shall by done, the standard of ordinary prudence, in the very nature of things, shifts with the varying circumstances of each case. Men, from nature and habit, vary in their conceptions of prudence. There is no fixed standard of universal application among men. When the trior, whether judge or juror, determines that a party has not exercised ordinary care, he necessarily fixes in his mind a standard by which to measure the party's conduct, and then finds he failed to come up to that standard. Where the law has fixed no standard, a standard must be adopted before we can proceed in a given case. Who shall fix the standard, the court or jury? The court, in determining a demurrer to evidence, has a delicate and important duty to perform. We think, however, that if the distinction between law and fact, and the capacity in which the court acts when determining the one and the other, as heretofore indicated, be kept in mind, but little difficulty can arise in the disposition of a given case.

There is no question about the right and duty of the court to declare the law, but when it assumes to determine a fact as contradistinguished from law, and peremptorily direct the jury to conform to that fact, it enters a field whose boundaries have not been definitely fixed, and the decision must be predicated on the facts of each case. Are there any rules by which the court must be governed? We know of none, but there are rules which, though not infallible, are helpful guides in our concrete investigations. "Where the facts are so clear and decided that the inference of negligence is irresistible, it is the duty of the judge to decide; but when the facts, or the inferences to be drawn from them, are in any degree doubtful," the jury must decide. Keller *v.* New York Cent. R. Co., 24 How. Pr. (N. Y.) 172. This language was quoted and approved by this court in Barton *v.* St. Louis & I. M. R. Co., 52 Mo. 253: "A demurrer to evidence admits every fact which any of the evidence tends to prove, and also every fact that the jurors may, with any propriety, infer from the evidence before them. It should be allowed

only when the evidence thus considered wholly fails to make proof of some essential averment." Noeninger *v.* Vogt, 88 Mo. 590. "If, upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but if reasonable minds may differ as to the conclusions to be drawn from the given facts, then the question of negligence must be determined from all the surrounding circumstances." Barry *v.* Hannibal & St. J. R. Co., 98 Mo. 62; Kelly *v.* Hannibal & St. J. R. Co., 70 Mo. 604: Tetherow *v.* St. Joseph & T. M. R. Co., 98 Mo. 74; Hahn *v.* St. Joseph & T. M. R. Co., 92 Mo. 440; Tabler *v.* Hannibal & St. J. R. Co., 93 Mo. 79, 31 Am. & Eng. R. Cas. 185; Wilkins *v.* St. Louis, I. M. & S. R. Co., 101 Mo. 93.

Judge COOLEY in Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99, clearly expresses our views on this important subject in the following language: "The case, however, must be a very clear one, which would justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent person ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next Judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed, in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. * * * Negligence, as I understand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury. The injury is therefore one which must take into consideration all these circumstances, and it must measure the prudence of the parties' conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person, under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such

other person, and he is not to be considered blamable, if the injury has resulted from the action of another, which he could not have reasonably anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury." "Twelve men," says Justice HUNT of the supreme court of the United States, in Sioux City & P. R. Co. *v.* Stout, 17 Wall. (U. S.) 659, "of the average of the community, comprising men of education, of little education, men of learning, and men whose learning consists only in what they have they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge."

Judge PORTER'S observations in Ernst *v.* Hudson River R. Co., 32 How. Pr. (N. Y.) loc. cit. 91, are opposite in this connection. He says: "Even among the cases which have been held so plain as to justify a nonsuit, there have been few in which the judges have not themselves disagreed, and the inquiry naturally occurs to the mind whether we are less liable than jurors to err on questions of pure fact, pertaining to the ordinary affairs of life. Our law is framed upon the theory that on such questions the citizen can rely with more security on the concurrent judgment of twelve jurors than on the majority vote of a divided bench. Unanimity is not required in our decisions on questions of law. It is otherwise with jurors, charged with determining issues of fact, and such issues should not be withheld from the usual arbiters, unless the evidence leads so clearly to one result that there is no room for honest difference between intelligent and upright men. A nonsuit should always be granted where the proof is so clear as to warrant the assumption, in good faith, that, if the questions were submitted to the jury, they would find the culpable negligence of the plaintiff contributed to the injury. But we have had occasion recently

to hear nonsuits of this kind justified on the novel ground that, unless the fact be determined in one way by the judge, it will be sure to be determined the other way by the jury. The corrections of judicial opinions on mere questions of fact may well be distrusted when we find them confessedly opposed to the common sense of mankind."

Mr. Beach says: "In the ultimate determination of the question whether plaintiff was guilty of negligence, two separate inquiries are involved: *First*, what was ordinary care, under the circumstances? and, *second*, did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care, it may be remarked that it is not always a fixed standard, and in many cases it must first be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law, and a matter with which a jury can properly have nothing to do." Beach, Contrib. Neg., § 163.

"Legal," says Holmes in his work on the Common Law, p. 127, "like natural divisions, however clear in their general outlines, will be found on exact scrutiny to end in a penumbra or debatable land. This is the region of the jury."

Speaking of these doubtful cases, TORRANCE, J., in Farrell *v.* Waterbury Horse R. Co., (Conn.), 46 Am. & Eng. R. Cas. 207, uses this language: "In such cases the law itself furnishes no certain, specific, sufficient standard of conduct, and, of necessity, leaves the trior to determine both what the conduct is, and whether it comes up to the standard, as such standard exists in the minds of the trior."

On this subject, in McCully *v.* Clark, 40 Pa. St. 399, STRONG, J., says: "When the standard shifts, with the circumstances of the case, it is, in its very nature, incapable of being determined as a matter of law, and must be submitted to the jury. * * * Here the standard of duty was to be found as a fact, as well as the measure of its performance."

Let us view plaintiff's conduct in the light of these authorities, and the principles deducible from them, and see if the court ought to declare, as a matter of law, that he cannot recover. It will be conceded, we presume, that there is no law which gave plaintiff specific direction what he was required to do under the circumstances of this case. His conduct must therefore be judged by what men of ordinary prudence would usually have done if they had been situated as he

Duty of court to declare defendant negligent.

was, the law having fixed no standard of conduct for him. Two questions of fact, then, must be answered in order to determine his rights: (1) What would a man of ordinary prudence usually have done under the circumstances? and (2) did plaintiff's conduct conform to that standard? The trial court submitted both of these questions to the jury for determination. This, defendant's attorney insists, was error. The contention is that the court ought to have fixed a standard of conduct for the plaintiff at the time and place of the injury, and the standard which, it is claimed, ought to have been thus fixed, is higher than that to which plaintiff did in fact conform; that is, it is claimed that the court ought to have instructed the jury that plaintiff, after stopping within five feet of the track, and being satisfied no train was in dangerous proximity, ought to have looked again, and, having failed to do so, he was guilty of contributory negligence, and therefore could not recover.

We think this case lies in the "penumbra or debatable land" of Holmes. In this case, the triors of the fact were properly left to determine the standard of ordinary prudence to which plaintiff was bound to conform, at his peril, and also whether plaintiff did in fact conform to that standard. We cannot conceive how we are more competent to determine what a man of ordinary prudence would have done, situated as Dr. Gratiot was, than twelve jurors, taken from the ordinary walks of life. The demurrer to the evidence in this case concedes that plaintiff stopped his horse within five or six feet of the track, that he looked, and saw the train 800 or 1,000 yards away: that the engine emitted no smoke, and he took it to be a switch.engine, and not approaching him; that the train which injured him was running sixty miles an hour, when the ordinance fixed its maximum speed at six miles an hour; that no whistle was sounded or bell rung within 800 yards of the crossing where the collision occurred; and that plaintiff had a right, when he attempted to cross the track, to assume, in the absence of evidence to the contrary, that the train that injured him had passed on schedule time, which was, at least, twenty minutes before he attempted to cross. We do not say that we find all these facts in the record, but we say there was evidence tending to prove each one, and, under the rule announced, they must be conceded in determining this demurrer. We do not think that the inference of plaintiff's negligence, from these conceded facts, is so clear and irresistible that it ought to have been taken from the jury. The jury found that plaintiff "exercised that degree of care and prudence that an ordinarily careful and prudent person, under like circum-

stances, would have exercised," and that he did not approach the crossing "without paying any attention to his own safety," and did not trust "to the obligations imposed upon the railroad company to warn him of an approaching engine and train," and we think there was evidence that warranted such finding. On the questions of inadvertence, not looking the second time, and mistake, we cite the following additional authorities in support of the view we take of the case: Renwick *v.* New York Cent. R. Co., 36 N. Y. 132; Ernst *v.* Hudson River R. Co., 32 How. Pr. (N. Y.) 79; Beisiegel *v.* New York Cent. R. Co., 34 N. Y. 623; Maginnis *v.* New York Cent. & H. R. R. Co., 52 N. Y. 215; Plummer *v.* Eastern R. Co., 73 Me. 591, 6 Am. & Eng. R. Cas. 165; Keese *v.* New York, N. H. & H. R. R. Co., 67 Barb. (N. Y.) 205; Barry *v.* Hannibal & St. J. R. Co., 98 Mo. 62; Barton *v.* St. Louis & I. M. R. Co., 52 Mo. 253; O'Connor *v.* Missouri Pac. R. Co., 94 Mo. 150, 32 Am. & Eng. R. Cas. 61; Piper *v.* Chicago, M. & St. P. R. Co., 77 Wis. 247.

This disposes of all the questions presented by the motion for rehearing, not fully covered by the original opinion. The motion will be denied. All of this division concur.

Injury at Crossing—Duty of Traveler to Stop, Look and Listen.—See Grostrick *v.* Detroit, L. & N. R. Co., *ante*, p. 332; Cleveland, C. C. & I. R. Co. *v.* Harrington, *ante*, p. 358; Richmond *v.* Chicago & W. M. R. Co., and note, *ante*, p. 367, 385; Cahill *v.* Cincinnati, N. O. & T. P. R. Co., *ante*, p. 390; Marks *v.* Petersburg R. Co., *post*; Louisville & N. R. Co. *v.* Webb, *post*.

Running Trains at Excessive Speed Past Crossing.—Columbus, C. C. & I. R. Co. *v.* Harrington, *ante*, p. 358; Illinois Cent. R. Co. *v.* Slater, and note, *post*.

MARKS' ADM'R

v.

PETERSBURG R. CO.

(*Virginia Supreme Court of Appeals, June 11, 1891.*)

Injury at Crossing—Contributory Negligence—Failure to Look—Backing Train.—One who, after standing at the side of a railroad crossing while a train passes, attempts to cross the track while the same train is backing, which she could not have failed to see had she looked, being but seven feet away, is guilty of negligence which will preclude a recovery for her death thereby.

Same—Partial Blindness on the part of one about to cross a railroad track will not excuse him from the exercise of ordinary care but imposes the duty of greater precaution to avoid injury.

ERROR to judgment of the hustings court of the city of

Petersburg, rendered on the 15th of November, 1889, in an action of trespass on the case, wherein W. R. McKenney, administrator of Elmira V. Marks, deceased, was plaintiff, and the Petersburg Railroad Company was defendant.

The action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate by the defendant company, at the intersection of its road with Market street, in the city of Petersburg, on the 27th of May, 1889. The deceased, a woman 53 years of age, was killed by being run over by a backing freight train, as she was crossing the railroad. There was a flagman at the crossing, but no lookout on the leading car, although an ordinance of the city provides that, "when a train of cars is moving backwards on any railroad within the corporate limits, said railroad company shall be required to keep a person on the leading car of such train to give proper warning to persons in the act of crossing the track in front of said train of cars." The evidence was conflicting as to whether the bell on the locomotive was being rung at the time. The defendant's track extends for some distance in Washington street, which intersects Market street at the place of the accident. The latter street, at that point, is "a much-traveled street, both by vehicles and pedestrians," and much shifting of the trains is done there; there being a side track also in Washington street, and a switch on either side of Market street. The railroad, like Washington street, runs east and west, and intersects Market street at right angles. The accident occurred a short while before sundown. At the trial the defendant demurred to the evidence, and the jury conditionally assessed the damages at $5,790. The court sustained the demurrer, and gave judgment for the defendant, to which judgment the plaintiff obtained a writ of error and *supersedeas* from one of the judges of this court.

W. R. McKenney, for plaintiff in error.

Alexander Hamilton and *R. B. Davis*, for defendant in error.

LEWIS, P.—The principles of law which govern the case are well settled. A railroad company, undoubtedly, is bound to exercise care to avoid a collision where its road crosses a public highway, and the greater the danger the greater is the vigilance required. It has accordingly been held in numerous cases, independently of any statute or ordinance on the subject, that, when a train is backed over a crossing in a frequented street, a lookout must be employed; that merely ringing the bell or sounding the whistle on the engine, when the train is standing near, with its rear to the crossing, is not sufficient

Duty of company and traveler at crossing.

warning to passers-by of an intention to back the train, and that without other notice the company will be negligent. The rights and duties, however, of the company and of the public are reciprocal, and hence no greater degree of care is required of the one than of the other. Both the company and the traveler on the highway are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence required is such as a prudent man would exercise, under the circumstances of the case, in endeavoring to fairly perform his duty. The traveler on the highway, when he approaches a crossing, must assume that there is danger, and act accordingly. The existence of the track is a warning of danger. He must therefore be vigilant. He must look and listen. He has no right to close his eyes and ears to the danger he is liable to incur; and if he does, and injury results, he must bear the consequences of his folly or carelessness. In such a case he is the author of his own misfortune. Beach, Contrib. Neg., § 65; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Nash *v.* Richmond & F. R. Co., 82 Va. 55; Norfolk & W. R. Co. *v.* Burge, 84 Va. 63, 32 Am. & Eng. R. Cas. 101; 4 Am. & Eng. Enc. Law 68, and cases cited.

In New York, P. & N. R. Co. *v.* Kellam's Adm'r, 83 Va. 851, 32 Am. & Eng. R. Cas. 114, where the subject is considered, it was held that a traveler on an intersecting highway, before crossing the railroad, must use his senses of sight and hearing; that he must look in every direction that the rails run, to make sure that the crossing is safe; and that his failure to do so will, as a general rule, be deemed culpable negligence.

The only exceptions to the rule have been stated to be these, viz.: (1). Where the view of the track is obstructed, and hence where the injured party, not being able to see, is obliged to act upon his judgment at the time,—in other words, where compliance with the rule would be impracticable or unavailing; (2) where the injured person was a passenger going to or alighting from a train, and hence under an implied invitation and assurance by the company to cross the track in safety; and (3) where the direct act of some agent of the company had put the person off his guard, and induced him to cross the track without precaution. 2 Wood, Ry. Law, § 323, and cases cited.

In the present case the negligence of the defendant company is conceded. There was no lookout on the leading car of the backing train, as the city ordinance in such cases requires, nor were such precautions of any kind taken as were necessary to duly warn the deceased of the approaching danger.

But the question arises, was that the cause of her death, or was she guilty of such contributory negligence as to defeat the action? For, unless the negligence of the defendant was the immediate and proximate cause of the injury, the plaintiff is not entitled to recover. Railroad Co. *v.* Anderson, 31 Gratt (Va.) 812; Dun *v.* Seaboard & R. R. Co., 78 Va. 645, 16 Am. & Eng. R. Cas. 363. The case, viewed in the light of the rule applicable to a demurrer to evidence, is substantially as follows: A few minutes before the accident occurred the deceased passed up Washington street, going west, in the direction of Market street. When she reached the intersection of those streets, she turned to the left, (*i. e.*, to the south), and started to cross the street. When within four feet of the railroad crossing, she stopped on the walk-way to wait for a freight train to pass, which was moving westwardly. This train, which consisted of an engine and three box-cars, was operated by an engineer and a fireman, who were on the engine, and a brakeman, who was riding on the rear car. Just before the rear of the train reached the crossing, the brakeman jumped off the car, and ran to a switch, about 15 feet east of the crossing, to turn the switch for the train to back on the side track at that point. The train passed over the crossing, where the deceased was standing, and stopped before its rear end had gotten half-way across Market street, which is less than 60 feet wide. The switch in the meantime having been turned, the brakeman at the switch signaled the engineer to back. One of the witnesses says he turned his face in the direction of the engineer, and "hallooed to him to come back;" another says he blew his whistle for him to come back; but both say that with his hand he also waved or beckoned him back. This was within twenty feet of the deceased. The signal was promptly obeyed, and the train moved slowly backward, but without a lookout on the leading car, as already stated. There was, however, a flagman at the crossing. The deceased meanwhile was standing on the granite walk-way, between the brakeman and the train, with an unobstructed view of both. After signaling the engineer, the brakeman turned his back to the crossing, and walked in the opposite direction, to couple the train, when it should get there, to a car standing on the side track. The deceased did not move from her position above-mentioned until after the train had commenced to back, nor until the leading car had gotten within "two or three steps" from her, when she started across the track. But, just as she had gotten her left foot over the last or southern rail, she was struck by the train, knocked down, and run over.

Facts reviewed.

The point at which she fell was several feet east of the walkway, where blood and particles of human flesh were afterwards found on the track. In the collision she received injuries which caused her death within an hour afterwards.

The plaintiff's contention, in answer to the defense of contributory negligence, is (1) that the deceased was not conscious of the reverse movement of the train before she was struck; and (2) that, under the circumstances, she was not bound to have seen it. But can this position be maintained? We think not.

As to the first point, two of the defendant's witnesses, who were eye witnesses of the occurrence, testify that, when the train of commenced to back, she was standing on the granite crossing close to the track. They say, further, that when she started to cross the track she stepped to the left, "as if to walk around the train," and the place where she fell, and the blood and flesh on the track, tend to sustain this view; that is, that she saw the train approaching her, and attempted to avoid it. If this evidence be in conflict with the plaintiff's evidence or any reasonable inferences from that evidence, it was, of course, waived by the demurrer to the evidence. But we perceive no such conflict. Neither Jennie Davis nor Lemme Starke, the two principal witnesses for the plaintiff, testify to the contrary, nor does any one else. The former, in answer to the direct question whether the deceased, in crossing the track, moved in a straight line, or swerved to the left, as if to avoid the train, said she did not know; and Starke merely says, in a general way, that she was crossing on the crossway. He does not say positively, however, that she was "on the crossway" when she was struck. But, waiving the defendant's evidence on this point, the result is the same. If the deceased did not see the backing train, she ought to have seen it, for had she looked, or in other words, had she exercised ordinary care, she could not have failed to see it. It was her duty, as we have seen, to be vigilant, and the train was only a few feet from her, with nothing to obstruct her view of it, when she stepped in front of it. The locality, moreover, is an especially dangerous one, because it is much frequented, and many trains daily pass over it. Much shifting of cars is also done there. This was presumably known to the deceased, as she had long been a resident of the city. Yet, without taking ordinary precautions for her safety, she stepped in front of the train, and was killed. It would be strange, if, under the circumstances of the case, the action could be maintained, notwithstanding the negligence of

Deceased guilty of negligence.

the defendant, for the defendant's negligence was no excuse for her want of care.

The language of the supreme court in Chicago, R. I. & P. R. Co. *v.* Houston, 95 U. S. 697, is very pertinent to the present case. In that case it was said: "The negligence of the company's employes [in failing to give proper signals] was no excuse for negligence on the part of the deceased. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

The fact, not before mentioned, that the deceased was blind in her right eye, does not affect the case; for that, instead of relieving her from the duty of ordinary care, imposed upon her the duty of greater precaution to avoid injury. 4 Am. & Eng. Enc. Law, 80 Beach Contrib. Neg. § 147.

The plaintiff, however, contends that the case is not within the general rule to which we have alluded, because, he says, the deceased had the right to act upon the presumption that the train that had just passed her would not be backed without proper warning; and for this proposition he relies upon Duame *v.* Chicago & N. W. R. Co., 72 Wis. 523, 35 Am. & Eng. R. Cas. 416, and French *v.* Taunton Branch R. Co., 116 Mass. 537. As to these cases, it is enough to say that, in their facts and circumstances, they widely differ from the case at bar. In the first case, as the deceased was approaching the crossing in a buggy, a train passed over it and out of sight, the view at that point being obstructed. It then, without any warning whatever, immediately backed towards the crossing, struck the deceased, and killed him. After the train passed, the deceased kept straight on, driving in a trot, and neither looked and listened. The court recognized the general rule that a person approaching a railroad crossing must look and listen, but held that, under the peculiar circumstances of that case, the deceased was evidently surprised and thrown off his guard, and that the question of contributory negligence ought,

Right of deceased to presume that train would not back.

therefore, to have been left to the jury. It accordingly reversed the action of the trial court directing a verdict for the defendant.

In the Massachusetts case, as the plaintiff approached the crossing in a light, open carriage, a train passed, and immediately afterwards she attempted to cross. There was no warning given that other cars were approaching, and she did not look in the direction from which the train had come, and gave as a reason that she did not suppose one train would follow another so closely. In crossing the track, she was struck and injured by a car that had been detached from the train for the purpose of making a flying switch, and it was held, as in the Wisconsin case, that the question of contributory negligence was for the jury. This case was criticised and disapproved of by the supreme court of Rhode Island in the recent and well-considered case of Ormsbee v. Boston & P. R. Corp., 14 R. I. 102, and held to be in conflict with both the earlier and later Massachusetts decisions. In the Ormsbee Case the plaintiff's intestate, a deaf mute, was struck and killed by a train of cars which was making a flying switch at a highway crossing. The engine passed the crossing towards the south, and then backed towards it on another track. As the engine was backing, the deceased looking towards it, stepped upon the track without looking north, whence the detached cars were approaching, and as he did so he was struck by the forward car, and killed. The plaintiff contended that the passing and backing of the engine diverted the attention of the deceased, and excused his not looking both ways. But the court, overruling this view, held that the failure of the deceased to look both ways was negligence as a matter of law, and therefore precluded a recovery, whatever may have been the defendant's negligence. After examining many authorities, it was said: "This review of the cases is sufficient to show the rule to be uniform and unquestionable that a traveler, in crossing a railroad, even in the absence of ordinary signals, must look up and down the track, except where he is unable to do so, or where, as a passenger or otherwise, he has an assurance of safety from the company which excuses him. Indeed, it is quite unusual to find so little difference in so many cases, and it must be for the reason that the rule is founded, not in opinion or judgment, but in common prudence and experience, to such an extent that courts can declare it as law."

The rule, as we understand it, stated a little differently and more fully, is this: If a person attempts to cross a railroad at a highway crossing, without using his senses of sight and hearing, even though the company be negligent, the

law, as well as common prudence, condemns his act as careless. But this is a mere presumption, which may be repelled by evidence, showing that the case is within one or more of the exceptions to the general rule before mentioned. In the absence of such evidence, however, the contributory negligence of such person, when injured, will preclude a recovery, unless the company might, by the exercise of ordinary care on its part, have avoided the consequences of the plaintiff's negligence. This qualification of the doctrine of contributory negligence is that laid down in the leading case of Tuff *v.* Warman, 2 C. B. (N. S.) 740, and so often recognized by this court. Railroad Co. *v.* Anderson, 31 Gratt. (Va.) 812; Dun *v.* Seaboard & R. R. Co., 78 Va. 645, 16 Am. & Eng. R. Cas. 363; Shenandoah Valley R. Co. *v.* Moose, 83 Va. 827; Virginia Midland R. Co. *v.* White, 84 Va. 498, 34 Am. & Eng. R. Cas. 212; Richmond & D. R. Co. *v.* Pickleseimer, 85 Va. 798.

Applying this test to the present case, we are of the opinion that the plaintiff is not entitled to recover; for it is manifest that ordinary care on the part of the defendant could not have discovered the negligence of the deceased in time to avoid the accident. When the train began to back, she was in a place of safety, apparently waiting for the train to pass, and remained in that position until the train was within about seven feet from where she stood. It was then too late to have stopped the train in time to avoid the effects of her own careless, not to say reckless, act, even had there been a lookout on the leading car, and everything done which ought to have been done in the exercise of ordinary care. Our conclusion, therefore, is that the judgment of the hustings court is right, and that the same must be affirmed.

RICHARDSON and HINTON, JJ., concur in the opinion.
LACY and FAUNTLEROY, concur in the result.

Contributory Negligence in Attempting to Cross Track Directly in Front of Approaching Train—Effect of Negligence of Company.—In Boyd *v.* Wabash Western R. Co, (Mo., June 29, 1891), 16 S. W. Rep. 909, it was held that the employes of a railroad company in charge of a train upon seeing a person apparently in the possession of all his faculties approaching the track, have the right to presume that he will not attempt to cross immediately in front of the train, and, they are not guilty of negligence if they proceed without abating the speed of the train. The court said: "Unless the doctrine of contributory negligence is to be entirely discarded, and engineers required to be such expert psychologists as to be able to read the minds of men, and know beforehand when a man in the possession of all his mental faculties is going to act in a way other than could be expected of an ordinarily prudent man, there was no evidence to take this case to the jury."

In Craddock v. Louisville & N. R. Co., (Ky., April 11, 1891), 16 S. W. Rep. 125, it was held that where, within the limits of a town, but not at a public crossing, a person attempts to cross the track immediately in front of a moving train which he sees, he is guilty of contributory negligence and cannot recover, although the train at the time was running at excessive speed. The court said: "Conceding the rate of speed, considering the place, was unreasonable, (and whether it be so in any case depends upon all the existing circumstances,) yet this did not authorize the appellant to negligently throw himself in the way of it, when he had ample warning of its approach, and then claim damages for any resulting injury. He knew that the train was approaching, and very near at hand. He had been warned of its approach by repeated blasts of the whistle, and it was in plain sight. He saw it coming, and yet, when within from fifteen to sixty feet of him, he attempted to cross the track. The burden of the evidence shows that the distance was not over fifteen feet when he suddenly went upon the track. The testimony shows that the appellant had been drinking some; and it is difficult, unless by reason of it, to account for such negligence upon his part. It is evident it was the direct cause of his injury. But for his own negligence in exposing himself to the danger, it would not have occurred."

In Corrady v. Lake Shore & M. S. R. Co., (Ind., Jan. 26, 1892) 29 N. E. Rep. 1069, it was held that a person who voluntarily and unnecessarily attempts to cross a railroad track in front of an approaching train is guilty of contributory negligence, and, having been struck and killed by the train, there can be no recovery against the railroad company for his death, though its agents were culpably negligent in the management of the train. The consequences of the contributory negligence of plaintiff's intestate in voluntarily attempting to cross a railroad track within the limits of a town will not be obviated by the fact that the train was running at a rate of speed prohibited by an ordinance of the town council.

In State (to use of Dyrenfurth) v. Baltimore & O. R. Co., 73 Md. 374, it was held that one who, in possession of all his faculties, attempts to cross a railroad track immediately in front of a locomotive from three to six feet distant and in full view and running at the rate of ten or fifteen miles an hour, is guilty of contributory negligence, and it is proper, in an action to recover damages for his death, to direct a verdict for the defendant, although there were circumstances showing that it, also, was guilty of negligence.

In Blight v. Camden & A. R. Co., (Pa., May 27, 1891) 21 Atl. 995, it appeared that the plaintiff's intestate stepped upon the railroad track in front of a locomotive and was instantly struck and killed. A companion of the deceased was with him at the time and succeeded in getting across the track in time to have avoided the collision. He testified that when they were approaching the track they stopped to see whether any train was coming, but the evidence showed that the engine could have been seen two or three blocks away. It was a rainy afternoon and both men carried umbrellas. The court held that the intestate was guilty of contributory negligence.

A person who crosses a track just as a train near by is moving towards him, and fails to look at the train, although it is in plain sight, is guilty of such contributory negligence that no recovery can be had for his death caused by the train striking him. Mehegan v. New York Central & H. R. R. Co., 125 N. Y. 768, 26 N. E. Rep. 936.

In Little Rock & Ft. S. R. Co. v. Dinsman, (Ark., April 25, 1891) 16 S. W. Rep. 169, the plaintiff was a boy sixteen years old. He heard a

train whistle and started to run to the railroad depot. A box-car on a side-track extended a few feet from the crossing. The boy ran around the car, and, without looking for the train, tried to cross the track when he was struck by the engine. The court held that, although the engine gave no signals for the crossing and was running at unusual speed, yet the boy was guilty of contributory negligence and no recovery could be had. The court said: "The fact that the train approaches the crossing at a greater rate of speed than is usual, coupled with the neglect of the employes in charge of it to sound the whistle or ring the bell, do not relieve the traveler from the necessity of taking ordinary precautions for his safety. 'Negligence of the company's employes in these particulars is no excuse,' says the supreme court of the United States, 'for negligence on his part.' Chicago, R. J. & P. R. *v.* Houston, 95 U. S. 697; Schofield *v.* Chicago, M. & St. P. R. Co., 114 U. S. 615, 19 Am. & Eng. R. Cas. 353. His want of care is not excused by the neglect to give the usual signals, because a reasonable person of ordinary care will not be misled by their omissions into rushing headlong upon a railway track without some use of his senses to ascertain if there is danger. Davey *v.* London & S. W. R. Co., 12 Q. B. Div. 70, 73. In Dublin, W. & W. R. Co. *v.* Slattery, L. R. 3 App. Cas. 1155, the following case is put, by way of illustration, by Lord CAIRNS: 'If a railway train, which ought to whistle when passing through a station, where to pass through without whistling, and a man were in broad daylight, and without anything to obstruct his view, to cross in front of the advancing train, and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushed with his eyes open to his own destruction.' The hypothetical case was approved, and the doctrine applied, by Lord COLERIDGE in Davey *v.* London & S. W. R. Co., 11 Q. B. Div. 213, in a case where the facts were as strong for the plaintiff as those here presented; and many cases may be instanced to the same effect. Chicago, R. J. & P. R. *v.* Houston, 95 U. S. 697; Schofield *v.* Chicago, M. & St. P. R. Co., 114 U. S. 615, 19 Am. & Eng. R. Cas. 353; Fletcher *v.* Fitchburg R. Co., 149 Mass. 127, 302; Cullen *v.* President, etc., of Delaware & H. Canal Co., 113 N. Y. 667; Pennsylvania R. Co. *v.* Righter, 42 N. J. Law, 180, 2 Am. & Eng. R. Cas. 220; Pennsylvania R. Co. *v.* State, 61 Md. 108, 19 Am. & Eng. R. Cas. 326; Daily *v.* Richmond & D. R. Co., 106 N. Car. 301, 42 Am. & Eng. R. Cas. 124. The language quoted describes this case, and, with the cases cited, shows that there was really no evidence to base a verdict for the plaintiff on."

LOUISVILLE & NASHVILLE R. Co.

v.

WEBB.

(90 Alabama, 185.)

Injury at Crossing—Contributory Negligence—Concurrent Negligence of Company—Question for Jury.—The neglect of a person, attempting to cross a railroad track at its intersection with a highway, to use his senses before entering upon the track, to discover the approach of a train, is, as a matter of law, contributory negligence, which bars an action for damages; and the fact that the company's watchman failed to perform his duty and

warn the traveler, whom he did not in fact see, but who was looking at him, as well as the fact that the train was running at an unlawful rate of speed, does not make it a question for the jury. MCCLELLAN, J., dissenting.

APPEAL from Jefferson Circuit Court.
Hewitt, Walker & Porter and *Thos. G. Jones*, for appellant.
J. G. Banks and *Cabanis & Weakley*, for appellee.

Case stated.

STONE, C. J.—The injury in this case was suffered in the City of Birmingham, at a point on Twenty-fourth street, where the defendant corporation and the Alabama Great Southern Railroad cross that street, on tracks parallel with each other, and about eleven feet apart. The business of plaintiff, Webb, was near the crossing, and he was familiar with the place, and with the fact that the two railroads crossed the street at that place. Both the testimony, and the diagram attached to the transcript, show that this crossing was within the area used by the defendant for switching purposes, and that its switch engine, in doing its work, frequently crossed at that crossing. Plaintiff was returning from his dinner to his place of business about 2 o'clock P. M. and, in reaching his destination, must cross the tracks of the two railroads. When he first approached the crossing there was a train standing on the track of the Alabama Great Southern, the track nearest to him, which extended partially across Twenty-fourth street, and blocked up the pass way. He waited until this train moved out of his way, which soon occurred. He then moved forward, approached the track of the defendant corporation, and was in the act of stepping on its track with a view of crossing it, when he was struck by the tender of a switch engine moving backwards, and received the injuries for which he sues. The defense is contributory negligence. There was proof of an ordinance of force in the City of Birmingham, which made it an offense, punishable by fine, for any railroad company to permit a locomotive engine, running on its track within said city, to move at a greater rate of speed than eight miles an hour when moving forward, and four miles an hour when moving backwards. There was a conflict in the testimony as to the rate at which the locomotive was moving when the injury was done, the several witnesses placing it all the way from six or eight miles up to twenty-five miles an hour. The engine being moved backwards, the lowest estimate—six miles an hour—was in excess of the limit allowed by the ordinance. So there was a conflict in the testimony as to the ringing of the bell, or other signal, required by statute to be given while an engine is moving within a vil-

lage, town, or city. Code 1886, § 1144. It follows that these questions, to the extent they were material, had to be solved by the jury.

Upon other questions there was no conflict, and we may state them as undisputed facts. They are chiefly taken from the testimony of the plaintiff himself, and, when not so taken, he does not controvert them. The defendant railroad company kept and maintained a watchman at Twenty-fourth street crossing, to warn and signal persons of approaching danger; and when the injury in this case was inflicted the watchman was at the crossing, but some ninety feet from the place of the injury. There was no obstruction between him and the plaintiff, nor between him and the approaching engine of defendant. The tender which struck the plaintiff was a high-tank tender, over which a person on the track in the direction it was being pushed, if within thirty feet of the tender, could not be seen by the engineer or fireman on the engine. As soon as the train on the Alabama Great Southern Railroad moved off, or, at furthest, as soon as plaintiff crossed its track, the track of the defendant railroad, for a hundred yards or more each way, was opened up to his view, without any intervening obstruction. Several persons, 90 to 150 feet away from him, saw his peril, and one of them hallooed to him. He himself testified that, in walking from one track to the other, he looked neither to the right nor to the left, and that he did not see the approaching engine or tender until when, warned by the halloo, it was so near to him that he could only partially escape the force of the collision, by throwing his body backwards. He testified, further, that, in walking from one track to the other, he was looking straight ahead at the flagman, who was sitting down with his flag across his lap, and looking in a different direction. There was some testimony that the flagman did signal him of his danger. In switching, the defendant corporation had frequent occasions to cross Twenty-fourth street at the crossing we have been describing. We have thus summarized the facts deemed material to the questions to be discussed.

The question which was made a controlling one in the cases of Savannah & M. R. Co. *v.* Shearer, 58 Ala. 672, and South & N. Ala. R. Co. *v.* Sullivan, 59 Ala. 272, does not arise in this case. There was a watchman and flagman stationed at the crossing, whose duty it was to maintain a lookout, and give notice of approaching danger. The most favorable construction of the testimony fixes the charge of negligence on the defendant corporation. To back its engine, within the limits of

Contributory negligence in failing to look.

Birmingham, at a greater rate of speed than four miles an hour, was a violation of the city ordinance on the subject, and placed the defendant in the wrong. That ordinance is a reasonable and humane police regulation, and ought to have been observed. This was negligence, and the greater the excess of speed over the authorized limit the more pronounced and palpable would be the negligence. So, if the watchman was not attending to his duties, and failed to warn plaintiff of his peril, when, with proper attention, he would have discovered it, this, too, was negligence, for which the defendant corporation would be liable. But there were duties resting on the plaintiff as well as on the defendant. If he was guilty of negligence which contributed proximately to the injury, then the law denies to him all right of recovery. The reason of this rule is obvious, and has been often expressed.

In South & N. Ala. R. Co. *v.* Thompson, 62 Ala. 494, this court said: "It is the duty of travelers, approaching the intersection of a railroad with a public highway, to look out and listen for trains or engines; and a neglect of the duty, contributing to an injury, will avoid all right of recovery for it."

In Gothard *v.* Alabama G. S. R. Co., 67 Ala. 114, we quoted the following language without dissent: "As a general rule, it is culpable negligence to cross the track of a railroad at a highway crossing, without looking in every direction that the rails run, to ascertain whether a train is approaching. If a party rushes into danger, which, by ordinary care, he would have seen and avoided, no rule of law or justice can be invoked to compensate him for any injury he may receive. He must take care, and so must the other party."

In Chicago, R. I. & P.R. Co. *v.* Houston, 95 U. S. 697, the language of the court was: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others."

And in Continental Improvement Co. *v.* Stead, *Id.* 161, that court said: "Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their lives are in imminent danger if collision happen; and hence it will not be pretended, without evidence, that they do not exercise proper care in a given case. But, notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them—such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their misfortune."

In Durbin *v.* Oregon R. & Nav. Co., 17 Oregon 5, 32 Am. & Eng. R. Cas. 149, "plaintiff had passed the crossing many times before, and was familiar with it. She had always used great care in looking for trains, but on this occasion she did not stop to look or listen. Her team came into collision with a passing engine, and she sustained considerable damage. *Held*, that the plaintiff was guilty of contributory negligence, and could not recover."

Mr. Beach (Contrib. Neg. § 9) says: "It is tolerably well settled that, under such circumstances (crossing a railroad track on grade), a traveller must look up and down the track attentively; and a failure to do this is generally negligence as a matter of law."

We might add citations indefinitely, but consider the foregoing as sufficient. We regard the question as settled in Alabama by our rulings cited above; and that a failure to employ the senses on approaching a railroad crossing, when such employment would insure safety, is, as matter of law, contributory negligence, and a complete defense to a suit for injuries sustained by the negligent handling of the railroad's train, unless such negligence was so reckless or wanton as to be, in law, the equivalent of wilful or intentional wrong. Tanner *v.* Louisville & N. R. Co., 60 Ala. 621; Memphis & C. R. Co. *v.* Copeland, 61 Ala. 376; Cook *v.* Central R. & Banking Co., 67 Ala. 533; Central R. & Banking Co. *v.* Letcher, 69 Ala. 106; 3 Brick. Dig. 672, § 25, *et seq.*

In Louisville & N. R. Co. *v.* Crawford, 89 Ala. 240, we defined the measure of wanton or reckless negligence which will overcome the defense of contributory negligence. We need not repeat it here. It is our intention to adhere to that doctrine. Leak *v.* Georgia Pac. R. Co., 90 Ala. 161.

The defendant asked separately thirty-six written charges and they were severally refused, and a separate exception was reserved to each refusal. What we have said above will show that, in many of these refusals, the circuit court erred. We need only mention the first five, each of which should have been given. It must not be understood, however, that in failing to comment on the other charges, we discover nothing in them to comment on. Our precise meaning is that what we have said will furnish a sufficient guide on another trial. Proving the distance a man can walk in an hour was not the proper means of ascertaining the rate at which the engine was moving when the plaintiff was injured. This, however, could not have injured the defendant. It was only another method of testifying that the engine was moving at a greater rate than four miles an hour. There is nothing in the other objections to testimony.

Instructions refused.

ON APPLICATION FOR REHEARING.

STONE, C. J.—The foregoing opinion and judgment reversing and remanding this cause, having been rendered at the last term of this court, a rehearing was granted on application of the appellee. In opening the case for further investigation, we were largely influenced by the frequent recurrence of the question, and by its great importance, alike to the traveling public and to railroad corporations. The industrious legal student cannot have failed to discover the vast number of cases which have been before the courts in which the pivotal question was substantially the same as that presented in the present record. Nor will he have failed to note the wide divergence, if not palpable conflict, of opinion which the various cases bring to view. All these considerations admonish us that the question we have in hand is one of great practical gravity. It has aroused the talents and learning, both of the bench and bar, on each side of the Atlantic.

Importance of question.

Fortunately for us, we have not been left to grope our way unaided through this somewhat bewildering mass of adjudged law. Counsel on each side have displayed great learning and industry, both in collecting the authorities, and in arranging and classifying them. This we have attempted to supplement with such additional exploration as we could bring into exercise. Still we will not pretend that in the very numerous authors and reported cases, some of which we propose to collate and others merely to cite, we will have covered the whole field of possible investigation. Such attempt would swell this opinion beyond permissible dimensions.

The plaintiff himself, in his testimony, gave a very succinct yet clear statement of all he did and all he did not do, all he saw, and what he did not see, immediately preceding and at the time he suffered the injury. The part he played, as given in our former opinion, is taken entirely from his testimony, and there was neither fact nor circumstance to weaken its force. We will state his testimony as facts.

Facts reviewed.

When the train of the Alabama Great Southern Railway moved out of his way, there was no obstruction between him and the track of the appellant. As soon as the receding train passed a few feet beyond him—at the latest, when he crossed the track of the Great Southern—his view was unobstructed up and down the track of the Louisville & Nashville for a considerable distance. Had he looked, he could not have failed to see the approaching train long before he endangered himself by his too near approach to its track. He testified that he looked neither to the right nor to the left, nor did he see the train until warned by the halloo, when it was too late to extricate himself. He testified that he was looking straight ahead at the flagman, some 90 feet distant, who, he said, was sitting down with his flag across his lap, and looking in a different direction. The collision occurred at 2 o'clock P. M., while plaintiff was returning from his dinner. As was said in the former opinion, there can be no question that the appellant railroad was guilty of negligence. It was within the corporate limits of Birmingham that the collision occurred, and every witness who spoke on the subject testified that the train, which was being pushed backwards, was moving at a faster speed than four miles an hour, the maximum limit fixed by the city ordinance. The testimony was in conflict on two other subjects of inquiry, namely, whether the whistle of the train was being blown, or the bell sounded, and whether the watchman was attentive to his duties. The solution of either of these inquiries against the railroad company fastened an additional act of negligence upon its employes. Hence the inquiry in this case was whether there was proximate contributory negligence on the part of the plaintiff and whether the evidence of it was such as that its sufficiency should have been charged on as matter of law. The trial judge declined to pronounce on its sufficiency and submitted it to the jury for the determination. This is the material question discussed in the re-argument, and to it we propose to confine what we have to say in reply thereto.

That the sufficiency of evidence to establish the charge of

negligence, whether causative or contributory, is generally one of fact for the jury, is a proposition which cannot, and should not, be questioned. Detroit & M. R. Co. *v.* Van Steinsburg, 17 Mich. 99; Kellogg *v.* Chicago & N. W. R. Co., 26 Wis. 223; Eaton *v.* Erie R. Co., 51 N. Y. 544; McGrath *v.* New York Cent. & H. R. R. Co., 63 N. Y. 522; Greany *v.* Long Island R. Co., 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473; Palmer *v.* New York Cent. & H. R. R. Co., 112 N. Y. 234, 37 Am. & Eng. R. Cas. 533; Central R. Co., *v.* Moore, 24 N. J. Law, 824; Bonnell *v.* Delaware, L. & W. R. Co., 39 N. J. Law, 189; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60; Philadelphia & T. R. Co., *v.* Hagan, 47 Pa. St. 244; Pennsylvania R. Co. *v.* Ackerman, 74 Pa. St. 265; Mahoney *v.* Metropolitan R. Co., 104 Mass. 73; French *v.* Taunton Branch R. Co., 116 Mass. 537; Craig *v.* New York, N. H. & H. R. Co., 118 Mass. 431: Kennayde *v.* Pacific R. Co., 45 Mo. 255; Lagan *v.* St. Louis, I. M. & S. R. Co., 72 Mo. 392; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Chicago & E. I. R. Co. *v.* Hedges, 105 Ind. 398; Spenser *v.* Illinois Cent. R. Co., 29 Iowa 55; Cleveland, C. & C. R. Co. *v.* Terry, 8 Ohio St. 570; Directors, etc., *v.* Jackson, L. R. 3 App. Cas. 193; Directors, etc., *v.* Slattery, *Id.* 1155; Kelley's Case, 75 Mo. 138; Drain's Case, 86 Mo. 574; Stepp's Case, 85 Mo. 229; Peter's Case, 116 Pa. St. 206, 30 Am. & Eng. R. Cas. 607; Baltimore & O. R. Co. *v.* Owings, 65 Md. 502, 28 Am. & Eng. R. Cas. 639.

When negligence is a question for jury.

The doctrine of submitting questions of negligence to the jury has been more steadfastly maintained in Illinois than in any other states whose decisions we have examined. Chicago, B. & Q. R. Co. *v.* Triplett, 38 Ill. 482; Pennsylvania, Co. *v.* Frana, 112 Ill. 398; Chicago, St. L. &. P. R. Co. *v.* Hutchinson, 120 Ill. 587, 32 Am. & Eng. R. Cas. 82; Chicago & E. I. R. Co. *v.* O'Conner, 119 Ill. 586; Terre Haute & I. R. Co. *v.* Voelker, 129 Ill. 540, 39 Am. & Eng. R. Cas. 615: Chicago, M. & St. P. R. Co. *v.* Wilson, 133 Ill. 55, 42 Am. & Eng. R. Cas. 153. The doctrine of comparative negligence prevails in Illinois, and it would seem that rulings in that state on the doctrine of contributory negligence should be less controlling with us than the decisions of other states which, like our own, repudiate that doctrine.

When failure to look is not negligence per se.

Cases may be found which hold that entering upon a public crossing of a railroad track without looking or listening, no matter how unobstructed the view, is not *per se*, and as matter of law, contributory negligence, which prevents a recovery, but that its sufficiency is a question for the jury. Ernst's Case,

35 N. Y. 9; Kennayde's Case, 45 Mo. 255; Tabor's Case, 46 Mo. 353; Robinson's Case, 48 Cal. 409; 4 Am. & Eng. Enc. Law, p. 72, note 2. It is generally held, and there is reason in it, that if intervening objects, such as an embankment, a deep cut, a hill, houses, trees, and such like, cut off vision, this excuses the fruitless attempt to look, and necessarily remits the inquiry of contributory negligence to the jury. Beisiegel's Case, 34 N. Y. 622; Petty *v.* Hannibal & St. J. R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618.

In the following cases it was held that if the railroad have a gate at the crossing which is found open, or if it maintain a flagman who gives no warning signal, this so changes the rule as to relieve the party, who is injured in the attempt to cross without looking or listening, from the disabling imputation of contributory negligence as a presumption of law. These cases hold that, in a category such as this, the question of contributory negligence must be disallowed, or submitted to the jury for decision dependent on the circumstances of the case. Glushing's Case, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372; Schneider's Case, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334; Stegemeier's Case, 118 Ind. 305; West's Case, 32 N. J. Law, 91, Chicago, M. & St. P. R. Co. *v.* Wilson, 133 Ill. 55, 42 Am. & Eng. R. Cas. 153; 4 Am. & Eng. Enc. Law, 72, note 1; Directors *v.* Wanless, L. R. 7 H. L. 12; Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 27 Fed. Rep. 159.

The later decisions have departed somewhat from the older rulings on the subject we have in hand. In the modern cases many categories of fact are held sufficient to take from the jury the inquiry of contributory negligence, and direct that they be ruled on by the court as matters of law. Of course, to come within this rule, the testimony must be sufficient in itself to bring the true and complete state of the inculpating facts before the mind of the court, without the aid of inferences to be drawn, and there must be no conflict in the testimony which proves the conduct relied on as contributory negligence. If inferences are to be drawn to make the category complete, or if conflicting testimony which is pertinent and necessary to the inquiry is to be reconciled or weighed, these, in a law court, are functions of a jury, and cannot be ruled on as matters of law. 4 Am. & Eng. Enc. Law, 73, note 2, and the authorities cited.

When court may take case from jury.

In the case of Schofield *v.* Chicago, M. & St. P. R. Co., 114 U. S. 615, 19 Am. & Eng. R. Cas. 353, it was decided that "where a person in a sleigh, drawn by one horse on a wagon road, approaching a crossing of a railroad track, with which

he was familiar, could have seen the coming train during its progress through a distance of seventy rods from the crossing, if he had looked, from a point at any distance within six hundred feet from the crossing, and was struck by the train at the crossing and injured, he was guilty of contributory negligence, even though the train was not a regular one, was running at a high rate of speed, did not stop at a depot seventy rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing. On these facts, it was proper for the trial court to direct a verdict for the defendant." Of similar import are Dodge *v.* Burlington, C. R. & M. R. Co., 34 Iowa, 276; Reeves *v.* Delaware, L. & W. R. Co., 30 Pa. St. 454; 4 Am. & Eng. Enc. Law, note 70, 2; Whitt. Smith, Neg. 386; 2 Shear. & R. Neg. § 476; Beach, Contrib. Neg. § 16, and note 1 on page 53.

In the case of Young *v.* New York, L. E. & W. R. Co., 107 N. Y. 500, 32 Am. & Eng. R. Cas. 130 (decided in 1887), the following is a synopsis of the facts and the decision: The accident occurred at a street crossing in the city of Binghampton. The railroad company maintained a double track at that place, the two tracks being separated by a space of seven feet—about the same distance apart as the two tracks brought to view in the case before us. The plaintiff approached from the south, and found a train standing on the southernmost track, but parted into two sections, so as to allow persons to pass through. The plaintiff walked rapidly through the opening, did not look up the northern track, which was straight, stepped on that track, and was struck by a train coming in the opposite direction on that track, and was injured. The court, in delivering its opinion, said: "We must take the fact to be that he [the plaintiff] could not have seen the train until he passed over, or nearly over, the south track. The north track was straight for at least half a mile towards the east, and the moment he got upon the middle of the space between the two tracks he could have seen a train approaching from the east for that distance. He was walking very rapidly, perfectly familiar with the locality and the use which was ordinarily made of the two tracks, and as he crossed through the opening between the parts of the standing freight train, instead of looking east, from which a train would ordinarily come on that track, he looked to the west, and heedlessly stepped in front of the engine. As he passed over the north rail of the south train a single glance to the east would have disclosed to him the approaching train, and he would have escaped injury. He was in a place of some peril in crossing these tracks, and should have

taken some care to protect himself. He was in no danger from the train on the south track, for that was stationary. If that to some extent obstructed his view on the north track, there was so much greater reason for him to take an observation the moment he had crossed the south track, so as to see whether he could cross the north track with safety; and for not doing so he is chargeable with contributory negligence, which bars his recovery." The judgment of the court, reversing the judgment of the trial, was that the plaintiff should have been non-suited; the court holding that he was guilty of contributory negligence as matter of law.

Of similar import to the foregoing are the following cases: Cullen *v.* Delaware & Hudson Canal Co., 113 N. Y. 667; Marty's Case, 38 Minn. 108, 32 Am. & Eng. R. Cas. 107; Hearne's Case, 50 Cal. 482; Allyn's Case, 105 Mass. 77; Matta's Case, 69 Mich. 109, 32 Am. & Eng. R. Cas. 71; Schilling's Case, 71 Wis. 255, 34 Am. & Eng. R. Cas. 60; Maher's Case, 64 Mo. 267; Fletcher's Case, *Id.* 484; Hallihan's Case, 71 Mo. 113, 2 Am. & Eng. R. Cas. 117; Zimmerman's Case, *Id.* 476, 2 Am. & Eng. R. Cas. 191; Henze's Case, *Id.* 636; 2 Am. & Eng. R. Cas. 212; Powell's Case, 76 Mo. 80; 8 Am. & Eng. R. Cas. 467; Lenix's Case, *Id.* 86; Taylor's Case, 86 Mo. 457; Glascock's Case, 73 Cal. 137; Ecliff's Case, 64 Mich. 196; Harris' Case, 37 Minn. 47; Straugh's Case, 65 Mich. 706; Holland's Case, 5 McCrary (U. S.), 549, 18 Fed. Rep. 243; Butterfield's Case, 10 Allen (Mass.), 532; Grippen's Case, 40 N. Y. 34; Belton *v.* Baxter, 14 Abb. Pr. N. S. (N. Y.) 404; Davis' Case, 37 Kan. 743, 32 Am. & Eng. R. Cas. 65.

In the case of Greenwood *v.* Philadelphia, N. & B. R. Co., 124 Pa. St. 572 (decided in 1889), the accident and injury occurred at a street crossing in the city of Chester. The opinion of the court was delivered by PAXON, C. J. He said: "At the railroad crossing the company had for some time kept a watchman and safety gates, which were lowered upon the approach of trains. Upon the night in question, when the hose carriage approached the crossing, the gates were not lowered. They had become out of order that morning, and had not been repaired. The watchman displayed no light, and gave no warning. The hose carriage did not stop as it approached the track, in order to afford an opportunity to look and listen, nor did it even slacken its speed, but continued on, and was struck by the train, and the plaintiff was thrown off the carriage and injured. Under such circumstances, does the case come within the familiar rule, 'stop, look, and listen?' It was strongly urged upon the argument that the rule referred to does not apply, for the

reason (*a*) that the plaintiff had a right to rely upon the fact that the safety gates were up, and (*b*) that the said rule is not applicable to towns and cities where trains are constantly crossing the streets. * * * Conceding that the company was required to take extra precaution by reason of the gates being out of order, yet the plaintiff was also bound to do his part. He had no right to omit the ordinary precaution when approaching a railroad crossing merely because he finds the gates up. Machinery of all kinds is liable to get out of order, and may do so just at the critical moment of the approach of a train. In all such cases the safety of the traveling public requires that each party shall be held to the exercise of due care. Had this hose carriage stopped near the crossing, instead of rushing on at reckless speed, this accident would not have happened. The train could have been seen for one hundred feet before the crossing was reached. If the rule to stop, look, and listen were always observed, an accident at crossings, now so frequent, would rarely occur, whether in town or country. * * * The rule itself is so valuable, is sustained by such abundant authority, and is, moreover, founded upon such excellent common-sense reasons, that we will neither depart from it, nor allow it to be undermined by exceptions. It is a clear and certain rule of duty, and a departure from it is more than evidence of negligence. It is negligence *per se*." The trial court had, as matter of law, instructed the jury to find for the defendant, and the supreme court affirmed the decision.

We are not inclined to approve this case in full. The open gate was, to some extent, an invitation to cross; enough so, it would seem to us, to raise a question for the jury. But we need not and do not decide this.

In the case of Dudley, W. & W. R. Co. *v.* Slattery, a case before the English house of lords, reported in L. R. 3 App. Cas. 1155 (decided in 1878), Lord Chancellor CAIRNS said: 'If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train, and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death."

In the case of Davey *v.* London & S. W. R. Co., 11 Q. B. Div. 213 (decided in 1883), Lord Chief Justice COLERIDGE delivered the opinion of the court. In that case, as in this, there were two parallel tracks near each other, and the injury was suffered in the attempt to cross the second of the

tracks. Pending the argument, the lord chief justice inquired: "Is it not using ordinary care to presume that when there is no obstacle to vision people will look to see if a train is coming? Counsel replied: "In the present case there was evidence of circumstances amounting to something in the nature of an invitation to the plaintiff. He is lulled into false security, and led to think that no train is expected by the fact that the servant of the company, whose duty it is to attend at the crossing, gives him no warning." The lord chief justice, in delivering the opinion of the court, said: "Now, it seems to me clear, upon the uncontradicted evidence of the plaintiff himself, that he himself caused the accident by walking straight into a train which he might have seen. There is a double line of rails. He comes first upon the down line on which the train is not coming. There is then the width of the down line, and the interval between the two sets of rails between him and danger. If he had only taken the precaution of looking to the left along the up line, while crossing over this space, he must have seen the coming train. He did not look to see what was plainly to be seen approaching, and in consequence he walked straight into the danger." The trial court had ruled as matter of law that the plaintiff could not recover, and the queen's bench division affirmed the decision. This case was again heard in the court of appeals (12 Q. B. Div. 70), and the judgment again affirmed.

In the case of Woodward *v.* New York, L. E. & W. R. Co., 106 N. Y. 369 (decided in 1887), the head-note fully sets forth the principle decided, as follows: "Deceased, while walking on a street, crossed by six tracks of defendant company, was struck by some cars which had been shunted down the grade, and were running by their own momentum. It appeared that deceased was well acquainted with defendant's custom of running cars down this track, which was a switch. The accident happened about noon of a clear day, and the deceased might have seen and avoided the cars by looking up the track on which they were running, and which was the first track to be crossed by him. He appears to have been watching some cars which were leaving the crossing on the the third and fourth tracks. *Held*, contributory negligence, and defendant was entitled to a non-suit."

To substantially the same effect are Ormsbee's Case, 14 R. I. 102; Lenix's Case, 76 Mo. 86 (decided in 1882); Schilling's Case, 71 Wis. 255, 34 Am. & Eng. R. Cas. 60 (decided in 1888); Beach Contrib. Neg. § 13; 4 Am. & Eng. Enc. Law, 73, note 1.

In reference to the liability of railroad corporations for

injuries done to persons, as to all other similar agencies, the rule of vigilance and diligence exacted of corporations and of persons exposed to peril is mutual and of equal degree. It is that measure of watchfulness which persons of ordinary prudence exercise in similar conditions of hazard. A railroad track, on which trains are likely to run at any time, is to some extent a warning. It is common knowledge that, unlike persons on foot, or employing the private modes of travel, railroad trains in motion cannot be instantly brought to a stand-still. Hence the reasonableness of the rule that persons about to cross a railroad track shall look and listen for an approaching train before attempting to cross. It is a rule in favor of human life, and of human safety, and, if thoughtfully observed, would render injuries of the kind here complained of almost, if not quite, impossible.

Rule of vigilance required.

It is contended for appellee that because the railroad's watchman was in sight, and gave no warning, this was an invitation to him to proceed on his way, and either acquitted him of all imputation of negligence, or, at least, left it a question for the jury. If the watchman had signaled the plaintiff to advance, or, having his attention directed to him, had done any affirmative act inviting his forward movement, we would hold this would be a perfect answer to all imputation of contributory negligence, unless it was shown the plaintiff had knowledge of the approaching train. If, during the short interval elapsing between the moving of the train on the Alabama Great Southern's track and the approach of the plaintiff to the Louisville & Nashville's track, the watchman's attention had been attracted to the plaintiff, and he had given no warning or signal of danger, we will not say this would not absolve the plaintiff from the absolute imputation of contributory negligence, such as may be ruled on as a conclusion of law. The inquiry whether, in such condition, the watchman would have time to take in the situation and give the warning, would, it would seem, present a question to be solved by the jury. In the present case, as testified by the plaintiff himself, he advanced immediately on the moving of the Alabama Great Southern's train, looked neither to the right nor to the left, but kept his eye on the watchman, who, he saw, was looking away from him, and of course did not see him. This was in no sense an invitation to him to advance, and did not relieve him of the duty of looking and listening before attempting to cross the track of the Louisville & Nashville Railroad.

Effect of watchman's negligence.

We adhere to our first opinion. Thompson's Case, 62

Ala. 494; Gothard's Case, 67 Ala. 114; Crawford's Case, 89 Ala. 240; Leak *v.* Georgia Pac. R. Co., 90 Ala. 161.

Reversed and remanded.

MCCLELLAN, J., (*dissenting.*)—I concurred in the original opinion handed down in this case at the last term, and this, too, upon full discussion in consultation of the bearing which should be accorded the attitude of defendant's watchman on the question of plaintiff's negligence. A further consideration of that matter, however, on the application for rehearing, constrains me now to dissent from the conclusions then and now reached by the court. My dissent proceeds in line with the criticism visited upon the case of Greenwood *v.* Philadelphia, W. & B. R. Co., 124 Pa. St. 572, in the opinion of the chief justice. In that case it was the duty of an employe of the defendant company to have the gates down at the time of the accident. The failure to discharge this duty —the fact, from whatever cause, that the gates, which should have been closed on the approach of a train, were on the occasion in question left open—was, according to the intimation of the chief justice, in the nature of an invitation to the plaintiff to cross—an assurance to him that no train was approaching—in such sort as to make the question of his negligence *vel non* one of fact for the jury. Here it was the duty of an employe of the defendant to keep an outlook for trains, to know when they were approaching, and to interpose a bar, when that was the case, to the further progress of persons about to cross the track, in the shape of a signal warning them of danger. It was this flagman's duty not only to know that a train was approaching, but to see, in that contingency, all persons about to come upon the track. This duty, so far from being relieved by the fact that a train had been standing on or passing along the further track from the watchman, was accentuated thereby, since it was but reasonable to suppose that there would be travelers, whose progress had been impeded by it, waiting to cross as soon as it was moved out of the way. All presumptions are favorable to the discharge of duty. The presumption here was that, if a train was approaching, the flagman, whose duty it was to know the fact, did not know it. The further presumption is that, knowing that fact, he would discharge his further duty of warning the plaintiff of it. The plaintiff, seeing the flagman at his post and receiving no intimation from him that it was dangerous to cross, may have been very naturally lulled into a sense of the safety of the attempt he was about to make. He had a right to assume that the watchman was discharging the functions of his position, and

that his attitude at the moment of the disastrous attempt to cross was in the nature of an assurance that it was safe to cross, and an invitation for him to do so. The attitude of the employe was inexplicable upon any other hypothesis which would be consistent with the duty he owed plaintiff, and which plaintiff was authorized to presume he would discharge, and was discharging at the moment he went upon the track. I cannot escape the conclusion that, in view of the watchman's attitude, importing in some sort an assurance of the absence of danger, calculated to allay circumspection on the part of the plaintiff, the question of contributory negligence should have been and was properly submitted to the jury, although the evidence is without conflict that plaintiff failed to stop, to look, and to listen.

Injuries at Railroad Crossings—Application of Rule Requiring Travelers to Stop, Look and Listen.—See, also, Grostick *v.* Detroit, L. & N. R. Co., *ante*, p. 332; Cleveland, C. C. & I. R. Co. *v.* Harrington, *ante*, p. 358; Richmond *v.* Chicago & W. M. R. Co., and note, *ante*, p. 367, 385; Cahill *v.* Cincinnati, N. O. & I. P. R. Co., *ante*, p. 390; Gratiot *v.* Missouri Pac. R. Co., *ante*, p. 398; Marks *v.* Petersburg R. Co., and note, *ante*, p. 418, 425.

General Rule.—In Denver & R. G. R. Co. *v.* Ryan (Colo., Nov. 16, 1891), 28 Pac. Rep. 79, it was held to be negligence and carelessness for a person to go, stand or be upon a railroad track without keeping a watch both ways for trains; also, it is the duty of a person going upon a railroad track to look and listen for the approach of trains, and observe the surroundings, and a failure to do so is negligence. And in Nash *v.* New York Central & H. R. R. Co., 125 N. Y. 715, it appeared that the plaintiff drove upon the railroad track at a crossing at a trot, without looking or listening for trains. He knew when the trains ran and could have seen the train which struck him when he was twenty-five feet from the track. The court held that he was guilty of contributory negligence.

It is the duty of a person crossing a railroad track at a highway to keep a proper lookout; and one time looking and listening at a distance from the track is not a proper lookout. Such a person must use his senses of sight and hearing, and if, by failure to do so, he causes injury to himself, he cannot recover. Hinkle *v.* Richmond & D. R. Co. (N. Car., Nov. 24, 1891), 13 S. E. Rep. 884.

In an action for injuries received at a railroad crossing, it is error for the court to refuse to charge that the track itself is a warning, and that persons about to cross it are bound to make use of hearing as well as of sight, and if either cannot be available, the obligation to use the other is the stronger, and that neglect to use either is negligence *per se*. Thomas *v.* Chicago & G. T. R. Co., 86 Mich. 496.

In an action to recover damages for alleged negligence, causing the death of W., plaintiff's intestate, it appeared that W., while passing along a city street, in attempting to cross one of defendant's tracks, was struck and killed by the tender of a locomotive which was backing down on the track, drawing a caboose. It was dark at the time, but quiet, and lights were burning in the cupola of the caboose; W. had crossed over three tracks before reaching the one where the accident occurred; some cars were standing on the first track which came within about twenty feet of the street. This track is about fifty feet distant from that on which W. was killed; the latter is straight for a long distance each way from the

street. No evidence was given tending to show that W. looked or listened before reaching defendant's tracks; plaintiff, his wife, who was following closely behind him, testified that she looked and listened when she approached the tracks, but saw no light or car approaching. *Held*, that the evidence failed to show any want of contributory negligence, and that a refusal to nonsuit the plaintiff was error. Wiwirowski *v.* Lake Shore & M. S. R. Co., 124 N. Y. 420.

Duty of Traveler to "See and Hear"—Instructions.—Where the testimony, in regard to the contributory negligence of one injured at a crossing, is conflicting, it is proper for the court to refuse to charge the jury that it was "the duty of the plaintiff to see and hear," and that his failure to do so was equivalent to not looking or listening, since such a charge would decide the question of plaintiff's negligence. Hinkle *v.* Richmond & D. R. Co. (N. Car., Nov. 24, 1891), 13 S. E. Rep. 884.

Point at Which Traveler Must Look for Train—Distraction of Attention —Instruction.—In Kenney *v.* Hannibal & St. J. R. Co., 105 Mo. 270, which was an action for injuries received at a railroad crossing, and where the defense was that the plaintiff was negligent in not looking and listening for the train, it was held that it was not error for the court to refuse to instruct the jury that it was plaintiff's duty to stop and look for an approaching train at a point from which the evidence showed the train would not be visible; nor to refuse an instruction that if plaintiff's attention, while approaching a crossing, was directed to his discomfort from the cold, etc., he could not recover, when there was no evidence of such mental condition.

Duty of Traveler to Get Down from Vehicle.—If a person, riding in a covered wagon towards a railroad crossing, listens at twenty yards distance, while riding upon the shaft, and neither hears nor sees an approaching train, it cannot be said that it is his duty to get down and look up and down the track, even though his view of the railroad line was obstructed. Hinkle *v.* Richmond & D. R. Co. (N. Car., Nov. 24, 1891), 13 S. E. Rep. 884.

It is not incumbent upon a traveler, about to cross a railroad track at a public crossing, to alight from his vehicle and go upon the track, before attempting to cross, when he can get a view of the crossing without alighting; and whether, in a given case, he has stopped to look and listen at the best place, is necessarily a question of fact for the jury. Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506.

Failure to Look at Proper Distance from the Track.—In an action against a railroad company for an injury at a railroad crossing, it appeared that the plaintiff, who was approaching in a vehicle, and was familiar with the crossing, when about 250 feet from the crossing, looked to the east where he could see about one-fourth of a mile, and saw no approaching train. He did not look to the east again, but looked to the west, where the view of the track was somewhat obstructed. If he had looked to the east when within 100 feet of the railroad, he would have had an unobstructed view of nearly one-half mile. He drove to the crossing in a slow trot and was struck by a train from the east and seriously injured. No signals were given by the approaching train. *Held*, that the court might adjudge, as matter of law, that the plaintiff was guilty of negligence. Mann *v.* Belt R. & Stockyard Co., 128 Ind. 138.

Crossing Track when Gates Were Raised Without Stopping to Look.—In Oldenberg *v.* New York Central & H. R. Co., 124 N. Y. 414, it was held to be a question for the jury whether one was guilty of negligence who started to cross a railroad track at a crossing with which he was unfamiliar upon the raising of the guard gates, and when a team had started to cross in the opposite direction, it appearing that there was a space of but three feet in which

he could have safely stopped to look for the train which ran against him or have seen the gate as it began to fall, and that he kept his head down as if looking at the walk, which was rough and uneven. The court said: "As said by this court in a recent case: 'The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience.' Glushing *v.* Sharp, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 374. Or, as laid down in a still later case: 'The open gate was an affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass.' Palmer *v.* New York Cent. & H. R. R. Co., 112 N. Y. 234, 241, 37 Am. & Eng. R. Cas. 533. While the deceased had the right to rely to a certain extent upon the assurance thus given by the defendant that it was safe for him to go on, it was still his duty to be on the lookout for danger, and to exercise the same care that a man of ordinary prudence would have exercised under the same circumstances. The degree of care depended upon his knowledge of the situation, or upon those facts that he would have discovered by the use of ordinary vigilance. It does appear that he had ever seen this crossing before, or that he knew anything about it, except what he observed on the occasion when he met his death. In this respect, as well as by the implied invitation to proceed arising from the use of safety gates, this case is easily distinguished from those relied upon by the defendant. Woodward *v.* New York, L. E. & W. R. Co., 106 N. Y. 369; Young *v.* New York, L. E. & W. R. Co., 107 N. Y. 500, 32 Am. & Eng. R. Cas. 130.

"It is claimed that he should have looked to the right, so as to see the approaching engine, and in front, so as to see the descending gate; but can it be held, as matter of law, that he had time for this, and also to use due care in other respects? According to the evidence not more than nine or ten seconds elapsed after the passenger train had gone by on the north track before the engine came down on the south track. During this short period he proceeded to cross; passed over two tracks, reached the third, where he could not safely stop, because at any time the passenger coaches standing there might back down upon him; went on two feet further, where the strip three feet long would have afforded safety if he had known it; took one step more, and, in the language of a witness, 'just as he gave the second step he was whirled around and pitched headforemost.' Can the court say that, knowing nothing of his surroundings, he was bound to look in any particular direction, while, hearing no bell and conscious of no danger, he took one step and a part of another? How long is a rapid walker in taking a single step? How much time was there for reflection or action? Even if he had stopped walking, how could he have decided on the instant just where it was safe for him to stand between the tracks? It was his privilege to look down upon the rough walk, so as to avoid danger there, and the evidence warranted the jury in finding that he did so. It was his duty to look to the east, where there was no obstruction in sight; but while he was bound to use his eyes, we cannot say that he was bound to use them in a particular manner, at a particular instant of time. We think that it was for the jury to take into consideration all the circumstances and decide whether he exercised such care as could reasonably be required of one in his situation and with his knowledge. Greany *v.* Long Island R. Co., 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473; Sherry *v.* New York Cent. & H. R. R. Co., 104 N. Y. 652, 657".

Reliance of Traveler on Custom of Company in Running Trains—Looking in one Direction Only.—In Nixon *v.* Chicago, R. I. & P. R. Co. (Iowa, Jan. 26, 1892), 51 N. W. Rep. 157, it was held that, although a railroad

company was negligent in failing to give the usual crossing signals, a traveler who, in reliance upon the usual custom of the company in the order of running its trains, looks only in one direction before driving upon the track, and is injured by a train coming from the opposite direction, which he could have avoided if he had used his senses, cannot recover.

Crossing Track in the Dark—Absence of Switchmen and Lights.—In St. Louis, I. M. & S. R. Co. *v.* Amos (Ark., Jan. 31, 1891), 15 S. W. Rep. 362, it was held that it is not negligence as a matter of law, to attempt, without stopping to look and listen, to cross a railroad track at a public crossing in the dark, at a time when no regular train is due, and when there are neither switchmen nor lights.

Necessity for Additional Precaution Besides Looking and Listening—Question for Jury.—In Beanstrom *v.* Northern Pacific R. Co., 46 Minn. 193, it was held to be a question for the jury whether one approaching a railroad track driving a team, who has looked and listened for a distance of several hundred feet and has checked his horses to a walk, should, under all the circumstances, have taken any additional precaution.

Failure to Stop Team Before Driving on Track.—In Wesley *v.* Chicago, St. P. & K. C. R. Co. (Iowa, Jan. 30, 1892), 51 N. W. Rep. 163, it was held that whether a traveler was negligent, considering the situation of the cars and his obstructed view, in not stopping his team before driving on to the track, is a question for the determination of the jury.

Foot Traveler Run Over by "Kicked" Cars.—Deceased, who was somewhat deaf, was killed at a crossing by cars of defendant, which had been kicked and were moving without a signal or a person on them. He was familiar with the crossing, and knew that no flagman was kept there, and that cars were liable to be moved there at any time. The evening was dark and cloudy and the smoke was heavy. A number of witnesses who saw the accident and were near deceased, testified that they saw the cars coming when eighty feet away, and deceased was in as good a position as they to see. Two witnesses testified that they had deceased in view all the time, and did not see him turn his head to look until just as he was struck. *Held*, that a verdict should have been directed for defendant because of deceased's want of care. Tierney *v.* Chicago & N. W. R. Co. (Iowa, Feb. 9, 1892,) 51 N. W. Rep. 175.

Crossing Tracks Where Trains Were Passing in Opposite Directions—Failure to Look for Second Train—Absence of Headlight.—In an action to recover damages for the killing of D., plaintiff's intestate, through the alleged negligence of defendant, it appeared that the accident occurred at a village crossing; that D. was familiar with the locality and knew that there were two railroad tracks upon which trains passed in opposite directions; that defendant had failed to comply with a request of the village authorities to erect gates at this crossing, but kept a flagman there, who, as he saw D. approaching from the south, on which track a train was then passing, the headlight on the engine of which was lighted, shouted to him that another train was approaching on the north track; D. was deaf, and the headlight on that train was either not lighted or turned down so low that the light was practically invisible. It appeared, however, that if D., after crossing the south track before stepping on the north track, had looked in the direction from which trains were to be expected, he would have seen the approaching train, which struck and killed him, as it was plainly visible. The court submitted to the jury the question as to whether the absence of the headlight was the cause of the accident. *Held*, error, as it was not shown nor could an inference be drawn from the evidence that the absence of the headlight did contribute to the accident. Also *held*, that plaintiff failed to show absence of contributory negligence on the part of D. Daniels *v.* Staten Island R. T. R, Co., 125 N. Y. 407.

Stepping on Track and Looking for Cars—Inconsistency of Verdict with Special Finding.—In Lake Shore & M. S. R. Co. *v.* Johnson (Ill., Jan 22, 1891), 26 N. E. Rep. 510, it is held that a general verdict for the plaintiff, in an action against a railroad company for injuries received at a street crossing, is not inconsistent with special findings that he stopped and stood upon the track, and before stopping looked to see if any cars were approaching and that there was nothing to prevent his seeing the cars, which struck him, where such cars might, when he looked, have been on a different track and have been afterwards switched over upon the track upon which he was injured.

Failure of Wife to Warn Husband or to Look or Listen.—Where a wife was riding in a wagon with her husband, who was driving, and they approached a railroad crossing, known by the wife to be dangerous, when a train was coming up in full view, and the husband stopped the team, but immediately afterwards attempted to cross in front of the train and both were killed, the wife in failing to warn her husband or to look or listen for approaching trains was guilty of contributory negligence, and there can be no recovery for her death. Miller *v.* Louisville, New Albany & C. R. Co., 128 Ind. 97.

Injury to Boy—Failing to Look.—In an action to recover damages for negligence, causing the death of T., plaintiff's intestate, the following facts appeared; T. was a boy twelve years old, intelligent, accustomed to attend school and assist the family by his labor; he lived near defendant's road; he was killed by one of defendant's locomotives when attempting to cross its tracks; the day was windy and it was snowing, but not enough to obstruct the view; the street upon which he was traveling was crossed by four of defendant's tracks; the first was a switch track upon which cars were standing on each side of the street, a passageway having been left open for teams and individuals to pass along the street. T. stopped in the centre of the switch track facing in the direction of the locomotive, which was backing down at a high rate of speed; if he had looked he could have seen 186 feet down the track; from the point where he stood to the center of of the track, where he was struck and killed, the distance was fourteen feet. T., after changing a bag he was carrying from one shoulder to another, started on; after taking one step he had an unobstructed view down the track on which the locomotive was coming, for two streets; he did not look in that direction after he started. *Held*, that T. was *sui juris* and was guilty of contributory negligence, and that the submission of the question to the jury was error. Tucker *v.* New York Cent. & H. R. R. Co., 124 N. Y. 308.

Distraction of Traveler's Attention.—In an action to recover damages for the alleged killing of R., plaintiff's intestate, at a highway crossing on defendant's road, it appeared that R. was familiar with the crossing. She approached it with a small shawl tied or pinned over her head and ears. There was no evidence that she looked up or down the track before attempting to cross, or that she stopped or listened; the only evidence being that she appeared to be looking directly in front of her. The track on which the train came by which she was killed, was free to observation for at least 700 feet from a point eight feet from the track where R. was injured, and from thence to the track. *Held*, that although R.'s attention may have been distracted by a freight train going in the opposite direction, or by a ditch across the highway two feet from the tracks, she was not justified in proceeding without looking both ways for approaching trains. Rodrian *v.* New York, New Haven & Hartford R. Co., 125 N. Y. 526.

Failure to Look—View is Obstructed.—Common prudence requires that a person walking across a railroad track at a crossing should look for approaching trains before going upon the track, and his failure to do so

when unexcused by any other facts than that the view was unobstructed until he came within six feet of the track, is negligence. Clark *v.* Northern Pacific R. Co. (Minn., Nov. 25, 1891), 50 N. W. Rep. 365.

Same—Failure of Traveler to Leave Vehicle and go to the Point Where he Could See Track—Question for Jury.—In Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, it was held that a person on foot, approaching a railroad crossing, is required to look and listen before attempting to cross, and his failure to do so is contributory negligence, which will defeat a recovery in an action for damages; and equal care is required of a person who is driving in a vehicle, except that, having stopped and listened on approaching the track, where his view was obstructed by a train of cars standing on a side track, he cannot be said to be guilty of contributory negligence, as matter of law, because he did not leave his vehicle, and go to a point where he could see that the track was clear; in such case, the question of contributory negligence must be submitted to the jury. The court said: "We are not prepared to assert, as a legal proposition, that his failure to alight from the wagon, and, leaving it, go to a point from which he could see along the main track, which the testimony tends to show was the only feasible means of viewing that track, was negligence which would bar plaintiff's recovery for simple negligence on the part of the defendant. The driver could not see an approaching train, while he continued with the wagon on its course, until too late to have averted the disaster. It was not with him to merely turn his head and look to the right and left, as with a person on foot, and to draw back or go forward accordingly as the situation then presented itself; but as he went on his way the peril was incurred and impending; he had reached a point from which he could not draw back before the true situation uncovered itself to his vision. We do not believe it is the custom of prudent men in approaching such crossings, under ordinary circumstances, in a vehicle, to do more than stop and listen, and to look only when that may be done without alighting from and without leaving their conveyances. We do not think that the exercise of due care requires such travelers, under all circumstances, to abandon their teams, and go in advance sufficiently near the track to see along its course, and then resume their vehicle, and attempt a crossing which, perhaps, has become perilous by reason of their delay while taking this precaution against peril, or which might become so in the interval while they are regaining their conveyance after viewing the track. Moreover, instances may easily be supposed in which it is impracticable to secure a restive or wild team while the driver goes forward to reconnoitre, and in which the danger from leaving it would be more imminent than that involved in attempting a crossing with only the assurance of one's ears as to its safety. With persons on foot, the case is quite different, and palpably so. An instant suffices for them to survey the track, and to act upon such survey. To do so involves no endangering delay, and no inconvenience at any time or under any circumstances. While reaffirming the doctrine of the cases *supra* as to foot travelers, we are not prepared to announce as a proposition of law that plaintiff's driver was guilty of contributory negligence under the facts, which one phase of the evidence tends to support, in failing to gain a point of view which commanded the main track, and adding the assurance of one sense to that of another that no train was approaching, before attempting to cross. The logic of this position is eminently satisfactory, we think, and it is not lacking in the support of adjudged cases, though there are authorities on both sides of it, including an expression in the leading case of Louisville & N. R. Co. *v.* Webb, 90 Ala. 185, 193. See, also, Beisiegel's Case, 34 N. Y. 622; Petty *v.* Hannibal & St. J. R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618, there cited, and Philadelphia & R. R. Co. *v.* Carr, 99 Pa. St. 505;

Lehigh & W. B. Coal Co. *v.* Lear, (Pa.), 32 Am. & Eng. R. Cas. 74; Donohue *v.* St. Louis, I. M. & S. R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 673; Pittsburg, C. & St. L. R. Co. *v.* Martin, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253; Artz *v.* Chicago, R. I. & P. R. Co., 34 Iowa, 160."

Injury to Traveler Who Did not See Train Until He Was Almost on the Track.—In an action for injuries received from a passing railway train at a public crossing it appeared that plaintiff, who was familiar with the ground, stopped twice to listen on approaching the crossing, once at a distance of one hundred and twenty feet and again at ninety feet; that he heard nothing; that he did not look because a train could not be seen until he came within a few feet of the track. When he reached that point, his horse smoving at a brisk walk, he looked to the west and saw nothing; then looked to the east and saw the train almost on him, his horses being at that time nearly across the rails. He struck them to hurry them up, but the buggy failed to clear the track in time, and the injury ensued. *Held* not error to refuse to instruct the jury that plaintiff could not recover. Kenney *v.* Hannibal & St. J. R. Co., 105 Mo. 270.

Negligence of Company in Running Train at Excessive Speed.—In Highland Avenue & Belt R. Co. *v.* Sampson, 91 Ala. 560, it was held that a person who, on approaching a railroad crossing, drives across without stopping to look and listen, is guilty of such contributory negligence as bars a recovery of damages on account of injuries sustained from a collision with an approaching engine; and the fact that the engine was running at a greater rate of speed than allowed by a municipal ordinance then in force, does not avoid or overcome the defense of contributory negligence, "if he used due diligence to prevent the collision after becoming aware of his peril, provided defendant, after plaintiff's peril was apparent, could have avoided the injury by the use of due care and vigilance."

Right of Traveler to Rely on Performance of its Duty by Company.—A pedestrian, before crossing a railroad track, must, in the absence of circumstances excusing it, look in each direction to ascertain whether a train is approaching; he may not omit this in reliance upon the performance by the railroad company of its duty to give reasonable notice of the approach of a train, and if he does omit it, the neglect of the company to discharge its duty will not relieve him from the imputation of negligence. Rodrian *v.* New York, New H. & H. R. Co., 125 N. Y. 526.

In Carney *v.* Chicago, St. P. M. & O. R. Co., 46 Minn. 220, it was held that one who is familiar with the locality and knows that a train is due, and who attempts to cross the track without looking for the train, or in the mistaken belief that he has sufficient time to cross, is guilty of negligence which will preclude a recovery for his death, although the train customarily approached slowly, while, on the occasion of his death, it was moving at a high rate of speed.

Right to Rely on Flagman Giving Warning.—One who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured, although the crossing was supplied with a flagman, and the flagman did not give notice of the approach of danger. A person attempting to cross should not have the right to assume, from that circumstance, that no danger existed, and enter upon the railroad track without looking. Had the flagman done anything to induce the appellant to attempt the crossing at the time she was hurt, or anything to throw her off her guard, then the question of her negligence would have been a question for the jury. Cadwallader *v.* Louisville, New Albany & C. R. Co., 128 Ind. 518.

Negligence of Company in Failing to Give Signal.—Though it should be shown that defendant had been negligent in failing to blow the whistle and ring the bell on approaching the crossing, plaintiff cannot recover where the accident was due to his own negligence in not looking and listening for the train with a degree of care proportioned to the likelihood of of such train passing at that time, and the difficulty of seeing and hearing it. Griffith *v.* Baltimore & O. R. Co., 44 Fed. Rep. 574.

Where a boy stopped on a railroad at a street crossing to await the passage of a train on another track and did not look or listen for a train on the track on which he stood, it is error to instruct the jury that, although he did not exercise care according to his age and discretion, the company is liable if the bell of the engine by which he was struck was not sounded for the crossing, and the failure to so sound the bell directly caused the injury. Dlauhi *v.* St. Louis. Iron Mountain & S. R. Co., 105 Mo. 645.

A person who, on approaching a place where two railroad trains had met and were standing, and attempted to cross the tracks, without stopping to look and listen, is injured by one of the engines moving slowly behind him, is guilty of contributory negligence, which bars a recovery of damages, unless the evidence also shows such negligence on the part of the person or persons in charge of the train as is the legal equivalent of willful or intentional wrong; and the mere failure to blow the whistle, or ring the bell, as required by statute, is not such negligence. East Tennessee, V. & G. R. Co. *v.* Kornegay, 92 Ala. 228.

In Sullivan *v.* New York, N. H. & H. R. Co., (Mass., Oct. 26, 1891), 28. N. E. Rep. 911, the plaintiff sued to recover damages for injuries received being struck by a locomotive at a grade crossing. The evidence showed that the plaintiff was a woman about 65 years of age, of ordinary understanding, and possessed of good sight and hearing. At the place where the injury occurred, the track had been raised several feet higher than the sidewalk, and the crossing was in a broken condition. There were three tracks, and a train was approaching on the middle one. The view was obstructed somewhat with buildings, but after reaching the first track it was clear. The evidence showed that plaintiff was familiar with the passing of trains; that she did not look before going upon the track; and that, if she had looked, she could have seen the train a quarter of a mile. When the whistle sounded she looked directly at the train, and hurried to get across. Plaintiff testified that she looked before going upon the track, but did not see the train or hear the whistle; that the only warning she had was the noise of its approach, after she was on the first track; and that she did not then look to see where it was, or on which track it was coming, but started to cross as fast as possible, and in so doing stumbled and fell between the rails. The signals required by the statutes were not given. *Held*, that it did not appear as matter of law that plaintiff was guilty of gross or willful negligence, and that it was proper to submit the question to the jury. The court said: "It was plain that upon this evidence the plaintiff was not in the exercise of ordinary care. If she looked as she testified that she did, and did not see the approaching train, she looked carelessly. If she looked and did see it, it was certainly not ordinary care to attempt to walk in front of it. If she did not look, her failure was at least a want of ordinary care. But a mere want of ordinary care would not defeat her recovery under the first count of her declaration, and the burden of proving gross or willful negligence rested upon the defendant. It is apparent that from the evidence a jury would be justified in finding that the plaintiff was in fact guilty, in addition to a mere want of ordinary care, of gross or willful negligence. The evidence discloses no need or motive which would justify her in taking extraordinary risks. She was merely walking from her home to a neighboring store, to

purchase groceries. She was familiar with the crossing and its attendant dangers. If, as might be found from the evidence, she attempted in such circumstances to cross in full view of a rapidly approaching train, without looking to see whether or not danger was imminent, her negligence would be properly characterized as gross. If, knowing that the train was approaching at speed, and realizing the danger of attempting to cross in front of it, she understandingly and intentionally took the risk of so doing, without any other motive than to avoid waiting while the train passed, her negligence would be gross and willful. Copley *v.* New Haven & Northampton Co., 136 Mass. 6, 19 Am. & Eng R. Cas. 373; Debbins *v.* Old Colony R., 154 Mass. 402. If situations similar to these, which plainly might have been found by the jury, are the only ones which could fairly and reasonably be found from the evidence, then it was the duty of the court to have ruled as matter of law that the plaintiff, upon the evidence, was guilty of gross or willful negligence, and to have directed a verdict for the defendant. But, in our opinion, other inferences, consistent with the theory that the plaintiff was guilty only of want of ordinary care, may fairly be drawn from the evidence, and, if so, the court was right in submitting the question to the jury. The usual ringing of the bell and sounding of the whistles were omitted. If, before entering upon the railroad, the plaintiff look up and down, and saw nothing, and again, when entering upon the east track, looked and saw no train, it could not be said as matter of law that up to that point she was guilty of gross or willful negligence in not having become aware of the approach of a train which came without the required and customary warning. If, when suddenly made aware of its approach by hearing the danger whistles, she was confused by the sudden peril, and went in front of the train because of her confusion, she could not be said to have been guilty of gross or willful negligence. Copley *v.* New Haven & Northampton Co., *ubi supra*. It is plain that either of the situations supposed, and perhaps others, consistent with gross or willful negligence, or with the want of it, may have been fairly found by a jury from the evidence. Under such circumstances, it is the province of the jury to deal with the evidence, under proper instructions from the court, which in this case were no doubt given."

Recovery Notwithstanding Failure to Look.— While a traveler riding on a wagon on the track is guilty of negligence in not looking back for a colliding train, still his negligence will not prevent recovery on his part if the servants of the company in charge of the train saw, or, by the use of proper care, might have seen, the peril to which the traveler was exposed, and thereafter could have avoided the injury and failed to do so. Hanlon *v.* Missouri Pacific R. Co., 104 Mo. 381.

Question for Jury.—In an action against a railroad company for personal injuries, it appeared that plaintiff was struck by an engine when stepping on the track at a crossing. Her testimony was that, before going upon the track, she looked and listened, but that it was dark and foggy, and that she was not able to see or hear anything. She testified that she saw a train on the further track, and noticed that it was a coal train, and that it carried red lights. Other witnesses testified that it was not foggy, and that they were able to see the accident, although they were some distance away. *Held*, that plaintiff's negligence was such that the court ought to have withdrawn the case from the jury. Hauser *v.* Central R. Co. of New York, (Pa. Feb. 29, 1892), 23 Atl. Rep. 766.

LOUISVILLE, NEW ALBANY & CHICAGO R. Co.

v.

CREEK.

(*Indiana Supreme Court, January 7, 1892.*)

Injury at Crossing—Wife Riding With Husband—Imputed Negligence.—The contributory negligence of a husband will not be imputed to his wife who was riding with him over a railroad crossing and who was injured through the negligence of the railroad company.

Motion for Judgment Non Obstante—Sufficiency.—A motion for judgment *non obstante* in these words "the defendant files motion for judgment on the answer to his interrogatories notwithstanding the general verdict for plaintiff" is sufficient.

APPEAL from Carroll Circuit Court.

E. C. Field and *C. C. Matson*, for appellant.

John H. Gould, for appellee.

McBRIDE, J.—Suit by the appellee, as administrator of the estate of Matilda McClintic, who was killed on a highway crossing by one of the appellant's locomotive engines. The complaint charges in substance that the decedent's death was caused by the actionable negligence of the appellant in this: That appellant had allowed a hedge, together with trees, bushes, and weeds, to grow along the line of its track, and adjacent to said crossing, to such height, and so densely that for a long distance all view of the track was cut off from persons on the highway; that the same obstructions, together with buildings erected along and near its track, tended to deaden and cut off the sound of approaching trains; that employes of appellant, in charge of and operating said locomotive engine, and drawing a train of cars, ran the same upon and over said crossing at a speed of 30 miles an hour, without having given the signals required by statute; that the decedent, with her husband, was traveling along said highway in a buggy; that they were at the time passing over said crossing, using due care, and guilty of no negligence, and were struck by said locomotive, and decedent was killed. Verdict for the appellee. With the verdict the jury returned answers to 46 interrogatories propounded by the appellant. The appellant moved for a judgment on the answers to interrogatories notwithstanding the general verdict. This motion was

Case stated.

overruled, and this ruling presents the only question in the record.

The appellee contends that the motion was fatally defective, and does not raise the question argued. The record entry of the motion is as follows: "Comes now the defendant, and moves the court for a judgment upon the answers of the jury to the interrogatories submitted notwithstanding the general verdict, which motion is in these words; 'State of Indiana, Carroll county—ss.: In the Carroll circuit court, May term, 1889. Creek, Adm'r McClintic, *v.* L., N. A. & C. Ry. Co. The defendant files motion for judgment on the answers to interrogatories, notwithstanding the general verdict for plaintiff.'" This motion was in writing and was signed by counsel for the appellant. Counsel for the appellee say: We submit that it is no motion at all. It merely announces that the appellee files motion, but where is it? And for whom is judgment asked? No question was presented by such a paper. Besides, as the appellant did not move for a judgment in its favor, it is not injured by the court ruling. The motion is certainly lacking in formality and in certainty. Rules of practice and procedure are necessary for the orderly conduct of litigation, and as aids in the administration of justice. It is no hardship to require of litigants substantial conformity to reasonable rules. It is possible, however, by an over rigid and strict enforcement of the rules of practice, to make them hindrances to the doing of justice, rather than aids. When a substantial controversy in fact exists between parties, which is so presented that the court can apply the law and adjust their rights, it would not be in accordance with the spirit of an enlightened jurisprudence to refuse to do so merely because of some slight informality, or a failure by one party to comply strictly with the rules of practice, in matters where the informality or omission will not work injustice or impose any hardship upon the opposite party. Thus applied, most beneficent rules might often serve as intrenchments for injustice. In our opinion, notwithstanding the informality and lack of precision and certainty in the motion, it is sufficient as a motion by the appellee for a judgment in its favor, and it is our duty to consider the questions thus presented. The motion for a judgment *non obstante* is based upon the grounds (1) that the answers to interrogatories show that the appellee's decedent was guilty of contributory negligence (2) that, if this is not true, they do show that the husband of the decedent, with whom she was riding at the time she was killed, was guilty of negligence, and that his negligence

Motion for judgment.

should be imputed to her, and precludes a recovery by her administrator. A motion for a judgment on special findings notwithstanding the general verdict should only be sustained when the special findings and the general verdict cannot be reconciled with each other under any supposable state of facts provable under the issues. Stevens *v.* City of Logansport, 76 Ind. 198; Pittsburgh, C. & St. L. R. Co. *v.* Martin, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253; Higgins *v.* Kendall, 73 Ind. 522; Louthain *v.* Miller, 85 Ind. 161; Amidon *v.* Gaff, 24 Ind. 128; Shoner *v.* Pennsylvania Co., (Ind. Sup.) 28 N. E. Rep. 616; Town of Poseyville *v.* Lewis, 126 Ind. 81; Cincinnati, H. & I. R. Co. *v.* Clifford, 113 Ind. 460, 33 Am. & Eng. R. Cas 81. The court will not presume anything in aid of the special findings, but will make every reasonable presumption in favor of the general verdict. Pittsburgh, C. & St. L. R. Co. *v.* Martin, *supra*; Shoner *v.* Pennsylvania Co., *supra*: Town of Poseyville *v.* Lewis, *supra*, and cases cited. As above stated, the special findings were 46 in number, They were also long, and no good purpose would be subserved by incorporating them into this opinion. After a careful examination, we are of the opinion that no specific fact is found which would justify us in disregarding the general finding that she was free from contributory negligence, necessarily embraced in the general verdict.

The principal argument of appellant's counsel is directed to the question of imputed negligence. Their position is that because of the relations existing between husband and wife, and because of his duty to care for and protect her, if a wife places herself in her husband's care by riding in a conveyance driven or controlled by him, and he is guilty of negligence in the control or management of the conveyance, his negligence is her negligence. If she is at the same time hurt by the negligence of another, being herself entirely free from fault, yet, if the husband's negligence contributes to her injury, his negligence will be imputed to her, and she cannot recover.

Imputed negligence.

We cannot sanction this doctrine. It was expressly repudiated by this court in the case of Miller *v.* Louisville, N. A. & C. R. Co., 128 Ind. 97. There are cases where the negligence of one person will be imputed to another; but, as stated in the case last cited, the extreme doctrine has never been sanctioned by this court. See, also, City of Michigan City *v.* Boeckling, 132 Ind. 39. The extent to which the doctrine of imputable negligence is recognized in this state is thus stated by MITCHELL, J., in Town of Knightstown *v.* Musgrove, 116 Ind. 121, at page 124, 116 Ind. "Before the concurrent negligence of a third person can be interposed to

shield another, whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other in respect to the matter then in progress as that in contemplation of law the negligent act of the third person was, upon the principles of agency or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law imposed upon him." The court in the same case further says: "When one accepts the invitation of another to ride in his carriage, thereby becoming in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful and skillful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury."

We can see no good reason why the foregoing statement may not apply to a wife riding with her husband with as much reason as to a stranger riding with him; nor why she may not be, in such case, a mere passive guest, without authority to direct or control his movements, and without reason to suspect his prudence or his skill. A husband and wife may undoubtedly sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion, there would be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sins because she was his wife.

In the case at bar the complaint contains the following averment: "* * * Her said husband driving said horse, and managing and controling said horse and buggy, the said Matilda having no control of her said husband, and no control or management of said horse and buggy." In aid of the general verdict it will be presumed that this averment was sustained by the evidence. It is unnecessary to express any opinion as to the effect of the special findings in showing

negligence on the part of the husband. As the case comes to us it is not material whether he was negligent or not. Judgment affirmed, with costs.

Injury at Crossing—Negligence of Driver of Vehicle—When Imputed to Other Occupants.—See generally Becke *v.* Missouri Pac. R. Co. (Mo.) 45 Am. & Eng. R. Cas. 174, note 180: Brickell *v.* New York C. & H. R. R. Co. (N. Y.) 42 *Id.* 107, note 110.

As a general rule the negligence of the driver of a vehicle, he not being in the employment or under the control of the person injured while riding thereon, cannot be imputed to the latter. Dickson *v.* Missouri Pacific R. Co., 104 Mo. 491. The negligence of the driver of a wagon cannot be imputed to one who is riding in the wagon with him, but the latter cannot recover unless it affirmatively appears that he was free from contributory negligence. Miller *v.* Louisville, New Albany & C. R. Co., 128 Ind. 97.

In East Tennesee, V. & G. R. Co. *v.* Markens, (Ga. Nov. 10, 1891,) 13 S. E. Rep. 855, which was an action for an injury at a railroad crossing, the plaintiff, a woman, having been a passenger in a public hack, it was held that she was under no duty to supervise the driver at the crossing, nor to look or listen for approaching trains, unless she had some reason to distrust the driver's diligence, in respect to those matters. The court held that a charge to the jury, as follows, was correct; "I do charge you that the negligence of the driver, if he was negligent, is not imputable in law to her. A person who hires a public hack, and gives the driver directions as to the place where she wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts of negligence, or prevented from recovering against the railroad company for injuries suffered from a collision of its train with the hack, if the same was caused by the concurring negligence of both the manager of the train and the driver of the hack. The only negligence on the part of the driver which will defeat or otherwise affect the right of Mrs. Markens to recover is embodied in the following proposition: If the negligence of the driver was the sole cause and the real cause of the collision, she cannot recover. If the driver and the manager of the train were guilty of negligence, both concurring to bring the collision about, such negligence on the part of the driver cannot have the effect either to defeat or diminish the plaintiff's right to recover."

And in Schindler *v.* Milwaukee, L. S. & W. R. Co., 87 Mich, 400, which was an action for an injury received by the plaintiff, a child five years of age, at a crossing of the defendant's railroad and a highway, it was held that the fact that the defendant was guilty of gross negligence, precluded its right to impute contributory negligence of the driver of the vehicle in which the plaintiff was riding. The court said: "It is claimed that the negligence of Schupp is to be imputed to the child and counsel cites in support of this proposition Lake Shore and M. S. R. Co. *v.* Miller, 25 Mich. 277, as settling the rule in this state. In this case Mrs. Miller, the plaintiff, was a woman of full age and discretion, and was riding with Mr. Eldredge, who was driving the team. It was said by the court in that case that the evidence tended affirmatively to prove actual and gross negligence on their part which contributed directly to produce the injury complained of, and that they were both aware in fact that danger was to be apprehended there, and the rule was settled in the case that the negligence of Eldredge, the driver of the team, was the negligence in fact of the plaintiff; that this was a private conveyance, and the plaintiff identified herself with the driver, and, unless the driver was free from negligence, she

could not recover. This is the general rule, and has been since followed in this state; but the facts in the present case plainly distinguish it from that. The charge in the declaration is for gross negligence. The jury have found the defendant guilty of gross negligence. There is no room, therefore, for the claim that the defendant company should be excused for its negligence, though Schupp may have been negligent, and his negligence might have been imputed to the child. Whether, under the circumstances stated here, Schupp's negligence could be imputed to the child, we do not determine, as under the finding of the jury there is no room for contending that Schupp's or the plaintiff's contributory negligence could be made applicable in determining the rights of the parties in this case. The term 'gross negligence' has been used in a case decided by this court, and has a definite meaning, when referred to as authorizing a recovery for a negligent injury, notwithstanding the contributory negligence of the plaintiff. It means the intentional failure to perform a manifest duty, in reckless disregard of the consequences, as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them. Counsel for defendant says in his brief, in referring to Lake Shore & M. S. R. Co. *v.* Miller, *supra*, and other cases cited sustaining the doctrine there laid down: 'But again all the above cases were cases of adults, and in that respect different from the case at bar of an infant 5 years old, and incapable of taking care of itself.' And in support of his first proposition that Schupp's negligence was a negligence of the child, cites Waite *v.* North Eastern R. Co., in El. B. & E. 219. In that case it appears that the plaintiff was an infant aged five years, and accompanied Mrs. Park, his grandmother, to the railway, and by her negligence, combined with the negligence of the servants of the railway company, the plaintiff was severely injured, and brought an action by his next friend against the company. It was held, by the court of exchequer chamber, affirming the court of queen's bench that the child was so identified with Mrs. Park, in whose care he was when the accident happened, that her contributory negligence would prevent recovery. In that case the question of the gross negligence of defendant was not presented, and therefore the case has no weight in the consideration of the present one, under the claim made."

In an action against a railroad company for personal injuries at a crossing, it was shown that plaintiff, a young girl, was in a carriage with her mother, and that the latter was driving when the accident occured. *Held* that, while the mother's negligence cannot be imputed to plaintiff, it was as much the latter's duty to suggest the necessary precautions, and to protest if they were not taken, as it was the mother's duty to take them. Griffith *v.* Baltimore & O. R. Co., 44 Fed. Rep. 574.

STEWART

v.

CINCINNATI, WABASH & MICHIGAN R. CO.

(*Michigan Supreme Court, December 22, 1892.*)

Jury Trial—Inspection of Place of Accident.—An inspection by the jury of the place where an accident occurred may be refused by the trial judge where three years have elapsed since occurrence of the accident and the surroundings have changed.

Injury at Defective Farm Crossing—Recognition of Crossing by Company—Evidence.—Evidence of the instructions given by a railroad company to its trackmen in relation to repairs of farm crossings is admissible in an action against such company for injuries from a defective bridge at a farm crossing, in connection with proof of repairs in accordance with such instructions, upon an issue whether it recognized the crossing at the time of the accident, and whether its appearance was such as to invite its use for that purpose.

Same—Duty of Company to Employe of Purchaser of Farm—Effect of Agreement.—An agreement between a railroad company and the owner of a farm through which its road crosses, giving the latter the right to cross its track and to provide him a suitable crossing, is more than a mere license, and imposes upon the company the duty of ordinary care to see that the crossing constructed is not dangerous to a subsequent purchaser of the farm or his employes accepting the implied invitation to use it, for so long a time as it is not removed but is continued as a crossing.

Same—Notice to Company of Condition of Crossing.—Actual notice to or knowledge by a railroad company of the unsafe condition of a farm crossing is not a prerequisite to its liability for injuries thereby sustained, where it is the duty of the company to exercise ordinary care to ascertain the condition of such crossing.

Same—Instruction Assuming Obligation of Company.—In an action for injuries received at a defective farm crossing, the issue in the case being whether the railroad company did actually maintain a bridge over a ditch at the crossing in question, and not as to its legal obligation to do so, the court erred in giving an instruction to the jury, of its own motion, which assumed the obligation of the company to maintain the bridge.

ERROR to Berrien Circuit Court.

Action to recover damages for personal injuries. The facts and the contract referred to in the opinion are set out in a prior report of the case. 42 Am. & Eng. R. Cas. 101. From a judgment for plaintiff, defendant appeals.

George S. Clapp, (*C. E. Cowgill*, of counsel,) for appellant.

E. L. Hamilton, (*O. W. Coolidge*, of counsel,) for appellee.

CHAMPLIN, C. J.—In addition to the facts stated in our former opinion, (80 Mich. 166, 42 Am. & Eng. R. Cas. 101), the defendant introduced testimony which tended to show that the ditch over which the bridge was constructed at that time was about four feet in width, and that in 1887 a freshet carried off several of the planks of the bridge together with some of the stringers, and left them a short distance to the west. Defendant also introduced testimony tending to show that none of the servants of the defendant were directed to replace the bridge, and the witnesses sworn did not know who did replace it, but it was repaired by some one, if it had been carried away, in the summer of 1887. Defendant also introduced testimony tending to show that when the bridge was first constructed, in 1882 or 1883, it was so constructed as to make a safe and sufficient bridge for the purpose in- Case stated.

tended, and that the stringers were composed of timber that would last without material decay from five to seven years. A portion of one of the stringers was produced upon the trial, and showed that it was decayed and rotten entirely through, so that its life and strength were gone. The plaintiff combated the claim that the bridge had been carried away or so injured by a freshet in 1887, and introduced testimony to rebut that of the defendant upon that point, and it was left a disputed question of fact to be settled by the jury. The principles laid down when the case was here before confined the issue to be tried to narrow limits. It was then said that the only duty that the plaintiff owed to defendant was that of the owner of premises, to see that they were in a condition which would not endanger the safety of third persons lawfully there. To this end it was competent to show that defendant, or those whose duties and obligations it had assumed, erected the bridge complained of in the first instance, and whether it was obliged to maintain and keep it in repair by any contract with the owner of the adjoining land was not important in this suit; the main question being, was it a dangerous structure, either through the faulty construction or decay and want of repair, and were the circumstances and surroundings such that the jury might infer that the plaintiff was invited to pass over the structure under the belief that it was in a safe condition to be used for the purposes for which it was erected? It was also a prerequisite to the recovery that the plaintiff should make it appear to the jury that he did not in any manner contribute to the injury which he received, through any negligence of his own.

Forty-two errors are assigned and urged as reasons for a reversal of the judgment. The first error assigned relates to the overruling of the defendant's motion to have the jury view and inspect the location and premises at which the injury occurred. The matter was in the discretion of the trial judge, and when it is remembered that this trial occurred in 1891, and the accident in 1888, and the testimony shows that the premises are not in the same condition which they were in at the time of the accident, it was not an abuse of the discretion reposed in the circuit judge to deny the motion. I discover no error in the rulings of the court upon the introduction of the testimony. This disposes of the errors assigned from the second to the thirteenth, inclusive.

View of premises by jury.

Witnesses were permitted, against defendant's objection, to testify to the custom of the defendant company in relation

to farm crossings, and inquiries were directed to the point as to what instructions the trackmen had received as to keeping farm crossings in repair. It was claimed that this testimony was irrelevant to the issue, and detrimental to the defendant. The defendant had proven that the railroad track crossing the land purchased from Kent had been raised about eighteen inches, as tending to show that this crossing was not regarded as of any use, and was in effect abandoned. The testimony of defendant's witnesses tended to show that their instructions were to, and they always did, keep the planks between the rails at such crossings spiked down; that otherwise they were a source of danger; and also that the defendant's servants usually removed the planks between the rails in the fall or approach of winter, and replaced them in the spring. One of the defendant's witnesses testified that a short time before the accident there were two planks between the rails at the crossing in question. Now, as it was a material question whether the defendant recognized the crossing at this point at the time of the accident, and whether the circumstances were such from appearances that the plaintiff was invited to use it as a crossing, it was proper to consider what the instructions and custom of defendant's officers and servants were with reference to farm crossings in order to prove that it did maintain this crossing at the time. If such was their custom, and these planks were there between the rails at the time, it would tend to prove that the company recognized it as an existing crossing, notwithstanding it had raised the road bed, and notwithstanding the claim that the bridge had been washed away by a freshet, and it had never replaced it. There was no error in admitting such testimony.

Evidence as to defendant's instructions to trackmen.

The defendant's counsel requested the court to charge, and he did charge, as requested, as follows: "If the appearance of this crossing, with its approaches and immediate surroundings, was such as to indicate to an ordinarily prudent man that he ought not, in the condition that it was in, drive upon it with a two-horse team and wagon, and the wagon loaded with wood, the plaintiff cannot recover. If the plaintiff, by failing himself to make a proper examination of such bridge before driving upon it, or if in any particular he was negligent, and such negligence contributed to his injury, the plaintiff cannot recover, and your verdict will be for the defendant. If the appearance of this bridge, with its approaches and immediate surroundings, was such as to indicate to a man of

Charge as to contributory negligence.

ordinary prudence that he should examine as to its safety before attempting to cross it, and if you find the plaintiff made no such examination, and that his failure so to do contributed in part or in any way to his injury, the plaintiff cannot recover."

Several requests presented by defendant's counsel were refused. Some of them were not applicable to the issue then being tried, and others were covered by the general charge of the court made by the jury upon his own motion. The defendant's counsel requested the court to charge the jury that "the defendant was under no obligation to the plaintiff under this agreement made with Warner, and which has been read in evidence, to repair or maintain this bridge in question; and the agreement is to be considered by you for no other purpose than as showing whether or not the defendant constructed the bridge in question" which request was refused. I think, as the request was presented, it was properly refused, for the reason that another purpose for which it was admissible to consider the agreement was that if the bridge was built under the agreement, and the defendant had continued in fact to maintain a crossing there, it was competent upon the point that the plaintiff was lawfully upon the premises. It was strenuously urged by counsel for defendant that the 'agreement amounted to a mere license to cross the railroad, and at the most, if there was such crossing at the point of accident as could be used by plaintiff, and from which an invitation or permission to cross the track at that place could be inferred, still plaintiff was a mere licensee, and the company owed him no duty to keep the crossing in repair for his use and benefit, but that he took his own risk in acting upon the license. The point raised is an important one, and the answer to it must determine the liability of defendant to plaintiff.

Whether defendant was under any obligation to plaintiff.

What is a "license," as relating to the occupation or use of real estate? In Morrill *v.* Mackman, 24 Mich., at page 282, this court said: "A license is a permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it, [citing cases]. It is founded on personal confidence, and therefore not assignable. 3 Kent, Comm. 452; Browne, St. Frauds, § 22. It may be given in writing or by parol; it may be with or without consideration; but in either case it is subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. Where nothing beyond a mere license is contemplated, and no interest in the land is pro-

posed to be created, the statute of frauds has no application, and the observance of no formality is important. But there may also be a license where the understanding of the parties has in view a privilege of a less precarious nature. Where something beyond a mere temporary use of the land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of those lands in a particular manner and for an indefinite period, and where the right to revoke at any time would be inconsistent with the evident purpose of the permission; wherever, in short, the purpose has been to give an interest in the land,—there may be a license, but there will also be something more than a license, if the proper formalities for the conveyance of the proposed interest shall have been observed. What that interest shall be called in the law may depend upon the character of the possession, occupancy, or use the promisee is to have, the time it is to continue, and perhaps upon the mode in which the compensation, if any, is to be made therefor. It may be an easement or it may be a leasehold interest; or, if the proper grant or demise has not been executed for the creation of either of these, the permission to make use of the land may still constitute a protection to the party relying upon it, until withdrawn."

The agreement in this case was made to facilitate the use of the land through which the railroad runs, severing it into two parcels. It was for an indefinite period, and the right to revoke it would be inconsistent with the evident purpose of the permission implied in the agreement. As between the parties to the agreement, there is implied a right to cross the railroad, and it means something more than a license. Nor was the plaintiff a mere licensee or trespasser in passing over the crossing.

In this case it is contended by the defendant that the agreement was personal, and was binding only between the railroad and the owner, and did not contain any covenants which ran with the land; and, moreover, it was an agreement to construct, and not to maintain. Conceding, without deciding, that this contention is correct, it follows that when Kent conveyed to Green on March 15, 1884, the obligation of the railroad company with respect to the crossing it had erected for Kent terminated, and they were at liberty to remove the structure at pleasure; but they did not remove it, but continued it as a crossing; and as long as they did so they were obligated to use ordinary care to see that it was

Effect of sale of farm on defendant's duty.

not dangerous to those who should accept the invitation to use it for the purposes for which it was maintained.

The difference between a license and an invitation to come upon or cross the lands of an owner or occupier is pointed out in the case of Nichols Adm'r *v.* Washington, O. & W. R. Co., 83 Va. 99. That was an action of tort. The railroad company had permitted the public to travel across its grounds in a path which led across its switch. It had been the invariable custom of the agent at the depot to part the freight cars immediately after they were placed upon the switch, to allow people to pass. The plaintiff's intestate, in passing between the cars to meet a brother at the depot, who was expected on the train, was crushed and killed by the sudden backing of the engine which brought the cars together. In deciding that case, the court said: "Now, it is agreed on all hands that there is a wide difference between the obligation which a person or corporation owes to a mere licensee, and the duty which the same person owes to one who comes upon his premises by an invitation, either express or implied. In the first case it is generally admitted that the party goes at his own risk, and enjoys the license subject to its concomitant risks and perils, and that in such case no duty is imposed on the owner or occupant to keep his premises in safe and suitable condition for his use, and the owner or occupant is only liable for any wanton injury that may be done to the licensee. [Citing Hounsell *v.* Smyth, 7 C. B. (N. S.) 738; Barnes *v.* Ward, 9 C. B. 392; Hardcastle *v.* South Yorkshire R. etc. Co., 4 Hurl. & N. 67; Binks *v.* South Yorkshire R. etc. Co., 3 Best & S. 250; Bolch *v.* Smith, 7 Hurl. & N. 741; Sweeny *v.* Old Colony & N. R. Co., 10 Allen, (Mass.) 375; Carleton *v.* Franconia Iron & Steel Co., 99 Mass. 216, Pierce, R. R, 274.] On the other hand, the law imposes an obligation on the owner or occupant to provide for the security against accidents or injury of those he has invited or induced to come upon his premises, by such an adaptation and preparation of his place for their reception and use as would naturally lead them to suppose that they might properly and safely enter thereon. Accordingly it has been generally held that where the owner or occupier, either directly or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition suitable for such use, and for breach of this obligation he is liable in damages to a person injured thereby. In all cases like the present it is a question of prime importance in determining the liability of the defendant to ascertain

Authorities reviewed.

whether the injured party was upon the premises at the time of the accident under a bare license or permission, or in pursuance of an invitation. Here the deceased must have adopted this route in pursuance of the invitation held out to him by the conduct of the defendant company." After citing the circumstances of the case, the court says: "Under such circumstances, it seems to us clear that the obligation was imposed upon the company to see that it should not become a source of danger to those to whom it had held out as a passage the way through which they might safely come, and the duty was imposed upon the company of notifying persons entitled or invited to use it in some noticeable way that it was about to be closed before closing it. Citing Railroad Co. *v.* Fitzpatrick, 35 Md. 38; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269."

In the case of Diamond State Iron Co. *v.* Giles, decided in the supreme court of Delaware, and found in 11 Atl. Rep. 189, it is stated that the general rule is that, while the owner of real estate is not bound to provide safe-guards for wrong-doers, he is bound to take care that those who come upon his premises by express or implied invitation be protected from injury resulting from the unsafe condition of the premises, and from other perils and accidents which the invited party had no reason to look for. In applying the rule to the question then before the court, it was said: "But the question of contract may be put entirely aside from the case, and the responsibility of the master may be planted upon the same grounds which render him responsible if the relation had not existed. Whether invited upon the premises by the contract of service or by the calls of business or by direct request is immaterial; the party extending the invitation owes a duty to the party accepting it to see that, at least, ordinary care and prudence are exercised to protect him against dangers not within his knowledge, and not within his observation."

In the case of Indiana, B. & W. R. Co. *v.* Barnhart, 115 Ind. 399, which was a case where two switch tracks ran across a railroad track of another company, and through a defective crossing an engine left the track and injured the plaintiff, an engineer upon the other track, the court said: "It is true, as contended, that the owner of premises is under no legal duty to keep them in good repair for the accommodation of persons going upon them for their own convenience merely. When a person has a license to go upon the ground or inclosure of another, he takes the premises as he

finds them, and accepts whatever peril he incurs in the use of such license; but when the owner or occupant, by inducement, enticement, or allurement, whether express or implied, causes another to come upon his land, he then assumes the obligation of providing for the safety and protection of the person so crossing, and for breach of duty in that respect such owner or occupant becomes liable for any injury which may result to the person so caused to come on his lands. The inducement, allurement, or enticement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiesence in the use of one's land by another is not sufficient. Such implied invitation may be inferred from some act or line of conduct or from some dedication;" citing, in support of the general doctrine, a long line of authorities.

Effect of company not having notice of condition of bridge.

It is further contended by counsel for defendant that the defendant is not liable for the injury caused by the breaking away of the stringers of their bridge, unless they had previously been notified or were aware of its unsafe condition. We do not think that actual notice or knowledge was a prerequisite to the liability of defendant. The duty imposed upon it, under the circumstances, was that of exercising ordinary care to see or ascertain the condition of the bridge, and the circuit judge quite fully covered this aspect of the case in the following instructions, viz.: "If the crossing was reasonably well constructed, the next question will be this: Was it permitted to become unsafe through the negligence of the railway company? Negligence, gentlemen, is the omission to do something which a reasonable person, guided by these considerations which ordinarily regulate human conduct, would do, or the doing of something which a reasonably prudent person would not do. In other words, one who fails to use the care and caution ordinarily used in like occasion by reasonably careful and prudent persons is negligent. In this case, was the defendant reasonably careful and prudent in caring for the crossing in question after its construction? So long as the bridge remains standing, and so long as the gates were not nailed up or otherwise permanently closed, or no notice given of imperfection in the bridge, it was the duty of the railway company to have kept it in reasonably good repair, considering the place at which it was situated and the uses to which it might naturally and reasonably be put. It is not necessary, as suggested by counsel for the railway company, to keep men in constant attendance upon or any watch over a bridge, nor to take extra-

ordinary care of one. It is, however, required to be reasonably careful. Now, then, considering the age of the bridge, its manner of construction, the character of the stringers and sills, the ordinary life of similar kinds of timber, the use to which it has been subjected, and any other facts in evidence pertinent to the question, it is for you to find whether the railway company was or was not reasonably vigilant or careful in the premises, and whether it did or did not act as a reasonably prudent person would have acted under like circumstances."

Several exceptions are taken to the charge of the court as given upon his own motion, but the only ones which are well taken are those which refer to the following portion of the charge of the court: "If the company had removed the bridge in question, while the landowner could have compelled it to furnish another crossing, the company could not be compelled to pay damages for an injury sustained on a bridge built by the farmer himself, or by some other person not connected with the railway company, unless, perhaps, the bridge so constructed had been permitted to stand so long by the company that it might reasonably be inferred that it had confirmed the act of building the bridge, and thus have made the bridge its own, or, at least, have made itself liable for any damages directly occasioned by the bridge. If the bridge had been removed by the freshet, and the new one had been constructed by some person not connected with the railroad company, the rule would be the same as in the case of the actual removal of the bridge at the instance of the company. In this case, however, the evidence does not show that all the stringers were removed at the time of the freshet, and, such being the case, the rules just referred to are not applicable. If a farm-crossing bridge is weakened by a freshet, or if it becomes unsafe or out of repair through any other cause, and if the exercise of reasonable care by the railroad company will avoid accident to one lawfully using it, the company will be liable, provided such person be free from negligence himself, as already indicated. Therefore in this case the question is this, was the company reasonably careful in the premises to avoid accident on or at the bridge in question?"

Instruction assuming that company maintained bridge.

I confess that this portion of the instructions of the learned judge is involved in uncertainty, if not in obscurity. The first portion quoted, so far as it relates to the question that, had the bridge been removed, the company could not be compelled to pay damages for any injury sustained on a

bridge built by the farmer himself, or by some other person not connected with the railroad company, is undoubtedly correct. But the succeeding clause, in which he told the jury that, unless, perhaps, the bridge so constructed had been permitted to stand so long by the company that it might reasonably be inferred that it had confirmed the act of building the bridge, and thus have made the bridge its own, or, at least, made itself liable to any damages directly occasioned by the bridge, does not appear to be applicable to the facts elicited from the testimony introduced in the case. It was correct to instruct the jury that if the bridge had been removed by the freshet, and if a new one had been constructed by some person not connected with the railroad company, the rule would be the same as in the case of actual removal of the bridge at the instance of the company. In neither of these cases would the company be liable to any one passing over the bridge, unless the company had by some further act, as by placing plank between the rails of its track, induced or invited persons to cross the track at that point. What the learned judge meant in his instructions that, "in this case, however, the evidence does not show that all the stringers were removed at the time of the freshet, and, such being the case, the rules just referred to are not applicable," does not to me seem clear. Neither would it be correct in this case to show that, "if the farm-crossing bridge is weakened by a freshet, or if it becomes unsafe or out of repair through any other cause, and in the exercise of reasonable care the railroad company would avoid accident to one lawfully using it, the company would be liable to one free from negligence himself, as already indicated. Therefore the question in this case is this: Whether the company was reasonably careful in the premises to avoid accident on or at the bridge in question." This appears to me to be also misleading. An equally important question which preceded the one which he stated to the jury was, had the company, by erecting the bridge at the point indicated, kept up and maintained a crossing over its track, including the approaches, by way of the bridge described in the testimony? As was stated in our opinion when the case was before us upon the first hearing: "It was a structure built upon its own land, and, by its nature and use, was a continual invitation to those lawfully having a right to cross from one side to the other at that place to enter upon it, and cross there; and so long as this invitation, thus impliedly given to such persons, continued, it was the duty of the defendant, independently of any contract, to see to it that it was safe for the purposes

implied by the invitation." It was not a question of legal obligation of the company to maintain the bridge, but of the fact whether or not they did maintain a crossing at that point, and if the jury found that they did, then they were bound to the exercise of reasonable care to maintain a safe crossing; that is, such a crossing as would be reasonably safe for the purposes intended by its erection. We are not sure that the jury, under the instructions above quoted, may not have lost sight of the question whether or not the company did in fact maintain a crossing at this point, including the bridge and the planking between its rails, and the gates through which persons desiring to cross might enter. Certain it is that if the bridge had been washed away by a freshet, and was not at the time replaced, and to all appearances safe, the plaintiff could not recover, even though the stringers had not been removed by such freshet.

The judgment must be reversed, and a new trial ordered. The other justices concurred.

Duty of Company in Placing and Keeping its Crossings.—Railroad crossings must be placed and kept in such condition that persons may cross them, with or without vehicles, without delay, danger, or injury, where the statute requires them to be so kept that their usefulness shall not be impaired. Galveston H. & S. A. R. Co. *v.* Matula, 79 Tex. 577.

In an action to recover damages on account of personal injuries, alleged to have been caused by negligence on the part of the defendant, in keeping a crossing in repair, exemplary or vindictive damages can not be allowed for any want of care less than gross negligence. Patterson *v.* South & North Ala. R. Co., 89 Ala. 318.

Defective Crossing—Evidence that Crossing was not Controlled by Defendant.—In Texas & N. O. R. Co. *v.* Dessommes, (Tex., March 3, 1891), 15 S. W. Rep. 806, which was an action for an injury resulting from a defective railroad crossing, the plaintiff testified that it was known as defendant's crossing. A witness testified that it was so known, that he believed it was kept in repair by the defendant, and that he had seen the defendant's workmen working on it. The city engineer, who had been the civil engineer of defendant and his general superintendent, testified that it did not own the crossing nor control it in any manner, but that it belonged to another railroad. *Held*, that the evidence offered by plaintiff was too unsubstantial to support a verdict, against the direct and positive evidence adduced by defendant.

Public Crossing—What Constitutes—Duty of Company at Foot Way.—The public use of a footway as a crossing over a railroad track, with the acquiescence of the company, does not convert it into a public crossing within the meaning of Revised Statutes, 1889, section 2608. Nor does such use and acquiescence devolve upon the company the duty of maintaining the footway as a public crossing and of keeping it open and unobstructed, subject to the statutory penalties for failure to do so. The company cannot, however, because such way is not a public crossing, negligently and recklessly run its cars over persons who are in the habit of using it as a crossing. If it discovers such person on said crossing, it is its duty to use

every precaution to prevent injuring him. Gurley *v.* Missouri Pacific R. Co. 104 Mo. 211.

Public Right of Crossing by Prescription—Adverse User.—Acts of crossing a railroad with carriages or on foot, at what was originally a private farm crossing established by agreement for the convenience of the owner of land on both sides of the railroad, must, in order to establish a public prescriptive right to cross thereat, be adverse and exercised as of right, and so sufficient in number, character, and extent of time as fairly to show that they were not merely incidental to the private right of crossing, but were in the assertion and exercise of a public right. McCreary *v.* Boston & Maine Railroad, 153 Mass. 300.

Injury at Private Crossing.—In an action for injuries received at a crossing, the fact that the road, which crossed the track at that place, was a private way, is immaterial where such road was commonly used with the knowledge of, and without objection from the railroad employes, who had often opened trains standing on the crossing to allow public travel over it. Schindler *v.* Milwaukee, L. S. & W. R. Co., 87 Mich. 400.

CLAMPIT

v.

CHICAGO, ST. PAUL & KANSAS CITY R. CO.

(*Iowa Supreme Court, December 16, 1891.*)

Footway Over Railroad—Person Crossing Track as a Trespasser.—Where a railroad company, through its employes and officers, has knowledge of the constant use of a footpath across its track, makes no objections thereto, and directs no obstructions to such use, it will be presumed to assent to it, thus giving all who use such crossing a license therefor. A person who is injured while crossing the track at such place is not a trespasser upon the railroad, but is entitled to all the rights of one rightfully upon it, and may recover for injuries resulting from the company's want of care.

Same—Duty of Company to Trespasser.—Even if the plaintiff, when injured while crossing defendant's track at a footpath, not at a public highway, was upon the track without right or license, this did not relieve the railroad company from the duty of exercising proper care to avoid injury.

Contributory Negligence—Negligence of Company—Failure to Give Signal.—Negligence on the part of a railroad company, and the absence of contributory negligence on the part of one injured while crossing its track, are properly inferred from the facts that the locomotive was running backwards at a high rate of speed, that neither the engineer nor the fireman were looking out, that the bell was not rung, that the person injured stopped and looked each way before crossing, but saw no cars, and that he could have heard the bell at a distance of fifty yards had it been rung.

Allegations and Proof—Place of Injury—"Public Crossing"—Footway.—In an action for injuries received while crossing a railroad track the petition alleged that the place where the accident occurred was a "public crossing or footway for footmen." *Held*, that such allegations would not restrict the plaintiff to proof that the place was a public highway, and evidence that it was used by footmen was properly admitted.

Same—Evidence that Engineer or Fireman Did Not Watch.—The plaintiff alleged in his petition that the engineer or fireman did not watch while the locomotive was approaching the crossing. *Held*, that it was proper to permit the plaintiff to show by his own testimony that at the time of the injury he saw no one upon the rear end of the tender of the locomotive, which was backing towards him.

Instruction as to Running and Operation of Engine.—Although the court charged the jury that the engine, which collided with the plaintiff, was run and operated substantially as alleged in the petition, this could not be construed to mean that the engine was run negligently, where, in another instruction, the jury were directed that they must find negligence to authorize a recovery.

Damages—Items of Damage—Verdict for Specific Sum.—In an action for personal injuries the amended petition stated several items of damage. The jury returned a verdict for a specific sum, no request having been made for specific findings. *Held*, that it would be presumed that there was no finding on one item for more than the item claimed, and defendant could not complain.

APPEAL from Polk District Court.

Action to recover for personal injuries sustained by plaintiff by reason of a locomotive operated by defendant striking him when he was crossing, on foot, the railroad whereon the engine was running. There was a verdict and judgment for plaintiff. Defendant appeals.

A. J. Baker, for appellant.

Smith & Morris, for appellee.

BECK, C. J.—1. The plaintiff, a carpenter, in going from his house in Des Moines to the place where he was employed in the same city, was accustomed to cross the Des Moines Union Railway, which was used by defendant in transporting its cars to its station house in Des Moines. The crossing of the railway tracks was made by plaintiff on foot, at a place much used by pedestrians, just at the foot of a bluff or bank which was approached by a stairway constructed by persons using the footway. While crossing the railway, when going to his work, according to his custom, he was struck by an engine and seriously injured.

2. Counsel for defendant maintain that plaintiff was not rightfully upon the railway track, and was a trespasser when he received the injury, and therefor cannot recover in this action. The place where the accident occurred was in the city of Des Moines, and was daily used by a number of persons employed at the pork house and other places in that part of the city, in going to and returning from their work. It had been used for a considerable time by such persons and others, who, or some of whom, as we have just stated, constructed a stairway down by the track for their own use, and for other pedestrians using the footway. A crossing of the

ditch near the track was constructed, by whom is not shown, of railroad ties, and was used until just before the accident. It is shown that pedestrians crossed the track at other places, just as they always do when the track is not fenced, or other impediments are not in the way to prevent them from doing so. There were no fences along the road, and nothing to prevent all persons desiring to do so crossing the road freely. The defendant and the railroad company owning the track, or either, had in no manner forbidden the crossing of the track by footmen, and had thrown no obstacles in their way. The fact that the place at the stairs was used as a crossing by pedestrians, who also crossed at other places near by, was known by the employes of defendant, and by the engineer who operated the engine which struck plaintiff. The stairway and the ties across the ditch, as well as the path made by footmen, prominently advertised the place as a crossing used by pedestrians. No engineer or fireman passing along the tracks at that place with his eyes open, in the exercise of reasonable watchfulness and care, could have failed to see these indications of a footpath, and to understand therefrom that it was used by pedestrians, if he possessed ordinary intelligence. The defendant and the railroad company owning the track, having through their employes and officers knowledge of the use of the footpath crossing, and having made no objections thereto, nor erected fences, walls, or other obstructions to such use, will be presumed to assent to it; thus giving all who use the crossing license therefor. Plaintiff therefore was not a trespasser upon the railroad track, but is entitled to all the rights and protection of one rightfully upon it with the license of the defendant. He may recover for injuries resulting from defendant's want of care, if not contributing thereto by his own negligence. In support of these views, see the following cases: Donaldson *v.* Mississippi & M. R. Co., 18 Iowa 280; Murphy *v.* Chicago, R. I. & P. R. Co., 38 Iowa 539; Evans *v.* Burlington & M. R. R. Co., 21 Iowa 374; Townley *v.* Chicago, M. & St. P. R. Co., 53 Wis. 626, 4 Am. & Eng. R. Cas. 562; Davis *v.* Chicago & N. W. R. Co., 58 Wis. 646, 15 Am. & Eng. R. Cas. 424; Barry *v.* New York Cent. & H. R. R. Co., 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615; Byrne *v.* New York Cent. &. H. R. R. Co., 104 N. Y. 362; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; Troy *v.* Cape Fear & Y. V. R. Co., 99 N. Car. 298; 34 Am. & Eng. R. Cas. 13, and cases cited in notes; Virginia Midland R. Co. *v.* White's Adm'r, 84 Va. 498, 34 Am & Eng. R. Cas. 22; South & N. Ala. R. Co. *v.* Donovan, 84 Ala. 141, 36 Am. & Eng. R. Cas.

151; Philadelphia & R. R. Co. *v.* Troutman, 11 W. N. C. (Pa.) 453, 6 Am. & Eng. R. Cas. 117; Taylor *v.* Delaware & H. Canal Co., 113 Pa. St. 162, 28 Am. & Eng. R. Cas. 656; Bellefontaine & I. R. Co. *v.* Snyder, 18 Ohio St. 399; Harriman *v.* Pittsburg, C. & St. L. R. Co., 45 Ohio St. 11, 32 Am. & Eng. R. Cas. 37; Stewart *v.* Pennsylvania R. Co., (Ind.) 14 Am & Eng. R. Cas. 679, and cases cited in notes; Shear. & R. Neg. 493; Patt. Ry. Acc. Law, 178.

3. But if plaintiff, when he was injured, was upon the track without right or license, this did not relieve defendant from the duty of exercising proper care to avoid the accident, and, if it occurred through defendant's negligence, it is liable. Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 480; Harlan *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 22; Hicks *v.* Pacific R. Co., 64 Mo. 430; Brown *v.* Hannibal & St. J. R. Co., 50 Mo. 461; Pennsylvania R. Co. *v.* Lewis, 79 Pa. St. 33; South & N. Ala. R. Co. *v.* Donovan, 84 Ala. 141, 36 Am. & Eng. R. Cas. 151.

4. The evidence fails to show negligence on the part of plaintiff contributing to the injury, as claimed by plaintiff's counsel. He stopped and looked each way for cars, and saw none. It does not appear that any whistle was sounded. The engineer and fireman testify that the bell was rung, but plaintiff states in his testimony that, while he was hard of hearing, he could readily hear an engine bell fifty yards, and that he heard none. The engine was running backwards, and neither engineer nor fireman was looking out on the side of the track he was approaching. The evidence tends to show that the engine was running at a high rate of speed, forbidden by the city ordinance. These considerations and others support the conclusion, doubtless reached by the jury, that defendant is chargeable with negligence, and that plaintiff did not contribute by his own negligence to the injury. Defendant's motion for a verdict was rightly overruled.

5. Plaintiff was permitted to introduce evidence, against defendant's objection, tending to show that the crossing had been used for a considerable time by pedestrians. Defendant insisted that under the issues plaintiff was restricted to showing that it was a public highway. The petition alleges that it was used as "a public crossing or footway for footmen," and was used by persons employed south of the railroad track, and who lived north of it. There is no allegation that it was a highway. The evidence was rightly admitted.

6. The plaintiff was permitted to show by his own testimony that at the time of the injury he saw no one upon the rear end of the tender. This evidence is now the ground of

complaint. Plaintiff aimed to show that the engine was run without sufficient watchfulness, and claims that the engineer and fireman did not watch. The evidence in question tends to prove that no other employe was watching, thus negativing an excuse for the alleged negligence of the engineer and fireman. Counsel for the defendant think the evidence ought not to have been admitted, for the reason that the jury would understand that the absence of a man on the rear of the tender was negligence. So it would be if the engineer and fireman did not keep a lookout, or, rather, their negligence in this regard would not be compensated by a watch on the rear of the tender. The evidence was rightly admitted.

7. Various rulings upon the admission of evidence showing the character of the crossing; the number of persons using it; that it was not a highway crossing, such a crossing being 400 feet from the stairs, etc.,—are made the ground of complaint. They were all in harmony with the views of the law which we have herein expressed, and are therefore correct.

8. The second instruction is complained of on the ground that it, in fact, directs the jury that the engine was operated negligently. It states that the engine was "run and operated by the employes of the defendant substantially as alleged, and at the time and place substantially as alleged." The petition shows the purpose of the operation of the engine. In another instruction, the jury are directed that they must find negligence to authorize recovery. It is very plain that the language of the second instruction complained of was not intended to inform the jury that defendant was negligent, and doubtless they did not so understand it.

9. Other rulings, in refusing and admitting instructions, are complained of by counsel for defendant. These rulings are not in conflict with the views we have expressed in this case, to the prejudice of defendant. If they at all fail to accord with our views, they depart in the direction of the defendant's side of the case. Some of the instructions, we think, require more proof to establish plaintiff's right to use the crossing than is demanded by the law, and they hardly recognize fully the rights of plaintiff to demand protection from negligence in case he had no license or consent by defendant to use the crossing. We are clearly of the opinion that the instructions are correct.

10. An amended petition filed pursuant to a motion of defendant for a more specific statement stated various items of damages claimed. The verdict was general, for one specific sum. This is now complained of by defendant. But no re-

quest was made for special findings, so that it could be certainly determined as to the findings upon the several items claimed. It cannot be determined whether the findings on any items exceeded the amount thereof stated in the petition. It will be presumed that there was no such finding, and, as defendant neglected its opportunity in the court below to demand findings as to damages, it cannot now complain of the verdict on the ground that it fails to show the amount of each item allowed in the verdict. The verdict, we think, is sufficiently sustained by the evidence, and is not excessive. We have not found it necessary to discuss, or even notice separately, each point made in the able argument of defendant's counsel. We dispose of the questions of law upon which these objections are based by a general discussion, which applies to the several points of counsel's argument. Any other course would have made this opinion unduly prolix. The judgment of the district court is affirmed.

Duties of Railroad Companies at Crossings by Custom on License.—See Harriman *v.* Pittsburg, C. & St. L. R. Co., and note, 32 Am. & Eng. R. Cas. 37, 55; Louisville & N. R. Co. *v.* Schuster (Ky.), 35 *Id.* 407, Nichols *v.* Washington etc., R. Co. (Va.), 32 *Id.* 27; Hanks *v.* Boston & A. R. Co., 35 *Id.* 321; note, 35 *Id.* 320, 321.

Injury at Crossings—Negligence of Railroad Company in the Matter of Giving Signals.

Negligence in Failing to Give Statutory Signal.—The failure to ring a bell on a moving railroad engine as required by a city ordinance constitutes negligence. Such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for, but not otherwise. Hanlon *v.* Missouri Pacific R. Co. 104 Mo. 381.

Where those in charge of a train approach a railroad crossing without giving the statutory signals, they are guilty of such negligence as renders the company liable to one who, without concurring negligence, is injured while attempting to cross the track. Baltimore, Ohio & Chicago R. Co. *v.* Walborn, 127 Ind. 142.

The fact that a locomotive signal is not sounded within eighty rods from a crossing, as required by statute, is sufficient evidence to support a finding that the company was negligent, in an action for causing the death of a traveler at such crossing. Evans *v.* Concord R. Corp. (N. H., July 25, 1890) 21 Atl. Rep. 105.

Statutory Signals—Failure to Sound Whistle but Once.—Where it is required by statute that the bell or whistle of a locomotive shall be sounded within 80 rods of a highway crossing and shall be occasionally sounded until the crossing is passed, the sounding of the whistle four hundred feet beyond the eighty rod point, and failure to sound it afterwards, is negligence, although the bell was continuously rung until the crossing was reached. Bales *v.* New York & N. E. R. Co., (Conn. March 20, 1891) 22 Atl. Rep. 538. The court said: "The practical interpretation of this statute is to sound the whistle when within 80 rods of the crossing, and to ring the bell until after passing the crossing. The language of the statute is in the alternative, and it will be literally complied with if either

is done to the exclusion of the other; but in a matter of this importance, where the highest degree of diligence may justly be required of railroad companies to protect life at crossings, a strictly literal compliance with the statute is not always enough, especially when it is apparent that such compliance may be ineffectual. There are times when statutes should be complied with according to their spirit and intent. Particularly is that so when the duty which the statute is designed to enforce does not originate in and is not measured by the statute. Here is a duty which exists at common law. It has its origin in the humane instincts of the race. Obviously the statute was not designed to define and limit the duty of railroad companies. They cannot do less than the statute requires. There are times and occasions when they may properly be required to do more. If both the whistle and bell would be more effective, the statute ought not to be so construed as to prevent their use from being required. Inasmuch as both are at hand ready for instant use, there can be no hardship in requiring both. And so this court was fully justified in saying on this subject that an omission to sound the whistle, except at a place where the railroad commissioners had authorized the whistle to be omitted, even if the bell was rung, would undoubtedly be regarded as negligence. Bailey *v.* Hartford & C. V. R. Co., 56 Conn. 444, 37 Am. & Eng. R. Cas. 483. It cannot be said that this is technically negligence, but without damage; for it cannot be known that the omission to sound the whistle at the post was not the cause of the accident. Obviously it might have been. And the court was justified in finding negligence. The wind was blowing from the east, so that its tendency was to carry the sound from the deceased. It does not appear whether he heard it or not. Perhaps there is some presumption that he did not; otherwise effectual measures would have been taken to prevent the accident. Perhaps, also, if he did hear it, the sound was so indistinct as to justify the suggestion of the court that he might reasonably have believed that it was for another crossing nearly a mile west. Who, then, can say that if the whistle had been sounded at a point some four or five hundred feet nearer the crossing the accident would not have been prevented? From what has been said it will be readily inferred that we are not pr pared to assent to the reasoning of the defendant's counsel that the sounding of the whistle some 1,700 feet from the crossing, 30 seconds away, was better for the deceased than it would have been at the post, 1,300 feet and 23 seconds away. A danger signal, giving 23 seconds of time, if heard and heeded, is better than one giving 30 seconds, if not heard, or, if heard, mistaken for something else."

Negligence in Failing to Sound Whistle at Whistle-post.—Where a railroad company has erected a whistle-post at a proper distance from a crossing in order to notify engineers where to give timely warning, and the purpose of the company is known to the public, so that persons crossing the tracks are led to act on the supposition that a signal will be given at the post, it is negligence on the part of the company, if the engineer fails to sound a whistle at the point so indicated. Hinkle *v.* Richmond & D. R. Co., (N. Car., Nov. 24, 1891) 13 S. E. Rep. 884.

Construction of Statute—What is a "Traveled Place."—A "traveled place," within the meaning of a statute requiring railroad companies to give signals when their locomotives approach any public highway or traveled place, means a place where the public have a legal right to cross the track, and not a place where people are accustomed to cross to reach a store and post office, where such crossing is not a public one and the company does not know of or acquiesce in its use. Barber *v.* Richmond & D. R. Co., (S. Car., Sept. 18, 1891), 13 S. E. Rep. 630.

Statute Making Company Liable for Failure to Give Signal—Survival of Action.—The right of action given by a statute which makes it negligence *per se* for an engineer to neglect to ring or whistle on approaching a crossing and making railroad companies liable "for all damages sustained by any person by reason of any such neglect," is personal and dies with the person injured. Galveston, H. & S. A. R. Co. *v.* Cook, (Tex., June 9, 1891), 16 S. W. Rep. 1038.

Order of Railroad Commissioners Dispensing with Signal at Certain Crossing.—Notwithstanding an order of the railroad commissioners dispensing with the blowing of a locomotive whistle on approaching a certain highway crossing, it is the engineer's duty to blow it at such crossing if this is necessary to prevent an accident, and if the exercise of ordinary care required it. Rowen *v.* New York, N. H. & H. R. Co., 59 Conn. 364.

Obstructed View—Failure to Give Signal as Negligence per se.—It is negligence *per se* for a moving train to omit to give, in reasonable time, some signal when approaching a highway from which the train is hidden by an embankment, cut, or curve. Hinkle *v.* Richmond & D. R. Co., (N. Car., Nov. 24, 1891), 13 S. E. Rep. 884.

Failure to Give Signal at Crossing by Custom—Evidence of Negligence.—In the absence of statutes regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching a highway crossing or a point where the public have been habitually permitted to cross at the intersection of a mill road or farm road frequently used, is evidence of negligence to be submitted to the jury. Hinkle *v.* Richmond & D. R. Co., (N. Car. Nov. 24, 1891), 13 S. Rep. 884.

Injury to Infant on Track—Failure to Give Signal—Precautions Taken by Engineer.—In Crystal *v.* Troy & B. R. Co. (N. Y., April 7, 1891), 26 N. E. Rep. 1103, the action was brought to recover damages for injuries received by a seventeen months old child. The child was on the track and the engineer, after discovering it, used every effort to avert the accident, but neglected to ring the bell or sound the whistle eighty yards from the crossing as required by statute. There was no evidence to show that the child's mother, who had taken precautions for preventing the child's going on the track, and who was searching for him through the house and yard some distance from the track, would have heard the signal or paid any attention to them had they been given. *Held*, that the damages sustained were not occasioned by reason of the defendant's omission to give the statutory signals, and a verdict in plaintiff's favor should be set aside.

Negligence of Engineer in Failing to Repeat Signal—Province of Jury.—In Andrews *v.* New York & N. E. R. Co., (Conn., Mch. 20, 1891) 22 Atl. Rep. 566, the injury was caused by a collision at a railroad crossing. The engine was about 90 feet from the crossing when the engineer saw plaintiffs approaching it in a wagon, about 10 feet therefrom. At the rate at which the train was moving it would reach the crossing in 2½ seconds. The whistle had been sounded at the usual whistling post, the bell was ringing, and the noise of the train could be heard more than 90 feet away. *Held* sufficient to justify the trial court in finding that the engineer's failure to again sound the whistle was not negligence.

Failure to Give Signal as Proximate Cause of Injury—Horse Running Away.—Failure of a railroad company to give a proper and timely signal at the approach of a train to a crossing, causing the driver of a horse and wagon, after looking and listening for such train, to drive upon the track in front of it, is the proximate cause of the death of the horse, which was fatally injured while running away, after the driver had abandoned it, to escape

seemingly imminent danger from the train. Quigley *v.* President, etc., of Delaware & H. Canal Co. 142 Pa. St. 388.

Distance from Crossing at which Signals must be Given.—Where it is required by statute that a locomotive bell or whistle be sounded at the distance of at least 80 rods from the highway crossing, and be kept going until the crossing is reached, these precautions must be taken by trains which start less than 80 rods distant from the crossing. Lake Shore & M. S. R. Co. *v.* Johnson, (Ill. Jan. 22, 1891), 26 N. E. Rep. 510.

Evidence as to Giving Signal—Question for Jury.—Whether or not the bell was being rung at the time of the accident is, where the evidence is conflicting, a question for the jury. Hanlon *v.* Missouri Pacific R. Co., 104 Mo. 381. And the appellate court will not disturb its findings on this question, even where it appears to be against the weight of the evidence, Dickson *v.* Missouri Pac. R. Co., 104 Mo. 491. Where one witness testifies that he heard no noise made by a locomotive before the accident, and another testifies that he heard three sharp whistles just as plaintiff's intestate was struck, but heard no whistle before, the question whether defendant whistled before the accident was held to be for the jury. Johanson *v.* Boston & M. R. Co., 153 Mass. 57.

The testimony of a fireman on a locomotive engine, whose duty it is to ring the bell when the engine is in motion, "that, although he had no independent recollection of ringing it on a certain occasion, yet it was his uniform and invariable habit to ring it, so that it had become second nature with him to do so, and that from these facts he was able to state positively that he did ring it on the occasion referred to," is competent and sufficient evidence to justify the jury in finding that the bell was rung, notwithstanding the testimony of other witnesses that they were in position to have heard it if it had been rung, and that it was not rung. Evison *v.* Chicago, St. P., M. & O. R. Co., 45 Minn. 370.

Other things being equal the testimony of the engineer and fireman of the train that the whistle was blown and the bell rung as it approached the crossing is entitled to more weight than the negative testimony of other witnesses that they did not hear either or both. Griffith *v.* Baltimore & O. R. Co., 44 Fed. Rep. 574.

Where in an action for injuries received at a crossing, there is some evidence that the locomotive engineer failed to sound the whistle when approaching the crossing, the question whether he did so, should be submitted to the jury, although the great preponderance of evidence shows that the whistle was blown. Nash *v.* New York Central & H. R. R. Co., 125 N. Y. 715.

Indictment for Failure to Give Signal at Crossing—Sufficiency.—An indictment against a railroad company, charging in the conjunctive form, a failure to ring the bell and sound the whistle upon approaching a crossing, is bad for uncertainty, under a statute making railroad companies liable for failure to sound a whistle or ring the bell. State *v.* Kansas City, S. & M. R. Co., (Ark., May 30, 1891), 16 S. W. Rep. 567.

McKELVY

v.

BURLINGTON, CEDAR RAPIDS & NORTHERN R. CO.

(*Iowa Supreme Court, February 1, 1891.*)

Defective Crossing—Statutory Presumption of Negligence—Contributory Negligence as a Defense.—A railroad company is not precluded from showing that an injury, alleged to have been caused by its negligence in maintaining a defective highway crossing, in fact resulted from other causes, including the plaintiff's negligence, by reason of a statute which provides that the neglect or refusal of a railroad company to keep highway crossings sufficient or safe, renders it liable for injuries caused by reason thereof, without other proof than of such negligence and refusal.

APPEAL from Lyon District Court.

Action for personal injury. Judgment for plaintiff, and the defendant appealed.

Van Wagenen & McMillan and *S. K. Tracy*, for appellant.

E. C. Roach, for appellee.

GRANGER, J.—On the night of October 24, 1889, plaintiff's intestate, William J. Webber, while crossing defendant's railroad on a public crossing with his team and wagon, was killed by driving off the embankment or approach from the highway to the railroad. This action was brought in behalf of his estate, and is based on the alleged acts of negligence by the company to properly construct and maintain such crossing. The following are provisions of the Code: "Section 1262. Any such corporation may raise or lower any turnpike, plank-road, or other highway for the purpose of having its railway cross over or under the same; and in such cases said corporation shall put such highway, as soon as may be, in as good repair and condition as before such alteration." "Section 1288. Every corporation constructing or operating a railway shall make proper cattle-guards where the same enters or leaves any improved or fenced land, and construct, at all points where such railway crosses any public highway, good, sufficient, and safe crossings and cattle-guards, and erect at such points, at a sufficient elevation from such highway to

Case stated.

admit of free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railway, and warn persons of the necessity of looking out for the cars; and any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such neglect and refusal; and in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal."

The district court, in separate paragraphs, instructed the jury as to a right of recovery under these sections, holding that the issues presented a cause of action under each; and as to a right of recovery under section 1262 the court said: "Under this statute and paragraph the plaintiff cannot recover if the evidence discloses that any negligence on the part of the said William J. Webber contributed to produce the injury." As to a right of recovery under section 1288 the court, after stating the facts that would render the company liable because of a neglect to properly make and keep the crossing in good repair, said: "Contributory negligence is not a defense, under this statute and paragraph." An assignment of error brings in question the latter clause of the instruction. In the instruction the court said to the jury: "If you find from the evidence that the defendant, at and prior to the time in question, had neglected to make and keep the crossing in question good, sufficient, and safe, and that said William J. Webber was injured and killed at said crossing, as alleged in the petition, and that his death was occasioned by reason of the neglect of the defendant to make and keep said crossing good, sufficient and safe, then you will find for the plaintiff." No other reference is made to the question of plaintiff's negligence; and from the instruction the jury would rightly understand that the plaintiff's negligence, however great, would not be a defense.

This view of the law is based on the language of section 1288, as follows: "And any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such neglect and refusal, and in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal." The plain import of the language is that if plaintiff proves that he was injured at the crossing, and that the company had neglected to properly construct it, the law will presume that the injury was the result of the neglect. The language of the section only makes the company liable when damages result "by reason" of neglect. Nor is it certainly compe-

Contributory negligence as a defense.

tent for the defendant to show that the injury was not by reason of the neglect. And let us suppose Webber intentionally drove off the embankment, and was killed; there surely could be no recovery in such a case. The injury would not be by reason of the company's neglect; nor would it be in any case where, if there had been no such neglect by the company, the accident would have happened. The complaint in this case is that the approach was not of sufficient width. Now, if the evidence should show that, with the approach of sufficient width, the accident would have happened, because of the intoxication or negligence of Webber, it would surely be conclusive that it did not happen by reason of the company's neglect in leaving the approach as it now is. It is thought by appellee that there is no evidence tending to show negligence on the part of Webber, but in that view we cannot concur. Without any intimation as to the conclusion to be drawn from the evidence on that subject, it does appear to be in conflict, and to an extent that the jury might have found that without any neglect on the part of the company the accident would have happened. There is evidence tending to show that Webber was intoxicated, and that for some distance before reaching the place of the accident he was driving outside of the wagon track, and over a surface that would indicate to one of ordinary observation that he was not in the road, and that he so continued to drive to the place of the injury. Webber was alone, and there is no living witness to testify as to how the injury occurred. The court gave to the jury no rule for the application of the fact of Webber's negligence, if he was negligent; but, on the contrary, it seems to exclude it, as having no bearing on the case as applicable to a recovery under section 1288.

The court used the term "contributory negligence." Such negligence, strictly speaking, is negligence that operates with other negligence in producing a result; and it is not our purpose to hold that proof of such negligence would excuse the defendant company from liability, for the language of section 1288 seems to exclude such a rule. As no other instruction was given bearing on the question of negligence, it seems to us that the effect of the court's instructions is to fix an absolute liability on a railroad company in a case where there is neglect in making such a crossing, and an injury occurs. The statute certainly means no more than it says,—that the company is liable when damage results by reason of its neglect. The statute gives to the plaintiff the benefit, upon limited proofs, of a presumption that the damage was by such reason. Such a presumption may be overcome by

proofs showing that the damage was the result of other causes, including that of the plaintiff's negligence.

We think the court, in excluding the rule of contributory negligence, should have given the law as to the effect of negligence as a defense, and that without it the instruction was misleading and prejudicial. We are cited by appellee to the cases of West *v.* Chicago & N. W. R. Co., 77 Iowa, 654, 32 Am. & Eng. R. Cas. 339, and 38 Am. & Eng. R. Cas. 340, and Engle *v.* Chicago, M. & St. P. R. Co., 77 Iowa, 661, wherein we placed a construction upon quite similar language in Code, § 1289; but it will be observed that our holding in this case in no way conflicts with the rule announced in those cases.

We do not find it necessary to consider other assignments, and the judgment is reversed.

ILLINOIS CENTRAL R. CO.

v.

SLATER.

(*Illinois Supreme Court, October 31, 1891.*)

Injury at Crossing—Two Brothers Killed at the Same Time—Res Adjudicata.—A judgment, in an action against a railroad company to recover damages for the death of a person killed in a collision at a crossing, is not a bar to an action for the negligent killing of his brother, who was riding with him in the same vehicle, and came to his death at the same time, although the same person brings both actions as administrator and the beneficiaries are the same in each case.

Speed of Train Where Team is Approaching—Question for Jury.—Whether it is a want of ordinary care for a train of cars to approach a highway crossing at its usual speed, although there is a team approaching the track, is a question for the jury.

Right of Engineer to Presume That Team Will Stop.—In an action for the negligent killing of a person at a highway crossing, it is not error for the court to refuse to instruct the jury that the engineer had the right to presume that a team approaching the track would stop, etc. The jury are to determine this from the evidence, and they should be left free and untrammeled.

Horses Becoming Unmanageable and Running on Track—Instruction.—An instruction that if a person in charge of a team stops forty or fifty feet from the track, and the horses afterwards become unmanageable and run upon the track, the railroad company is not responsible for the action of the horse or for any damage to them, was properly refused, as liable to mislead.

Evidence as to Whether Bell Was Rung.—Upon the question whether the bell of a locomotive was rung as it approached a crossing, witnesses may testify that they would have heard the bell if it had been rung.

Absent Witness—Holding Case Open.—The refusal of the trial court to exercise its discretion to hold the case open until an absent witness could arrive, held not a ground for a reversal of the judgment.

APPEAL from appellate court, second district.

Action for the negligent killing of plaintiff's intestate. Judgment for plaintiff, and defendant appeals.

W. & W. D. Barge, for appellant. *J. W. Allaben* and *Dixon & Bethea*, for appellee.

CRAIG, J.—This was an action brought by Belford Slater, administrator of the estate of Lewis W. Slater, deceased, against the Illinois Central Railroad Company, to recover damages resulting from the death of the deceased, caused, as alleged, by the negligence of the railroad company. Belford Slater, the father of Lewis W. and Arthur B. Slater, on the 24th day of August, 1886, sent the two boys from his farm to Polo, with a wagon and span of horses, for the purpose of getting certain goods. Lewis was 13 and Arthur 10 years old. On their return home, while attempting to cross the railroad track, a passenger train on defendant's railroad collided with the wagon, and both boys were killed. Belford Slater was appointed administrator of the estate of each of his sons, and brought separate actions to recover for the death of each. The action for the death of Arthur B. was tried at the August term, 1887, of the circuit court of Ogle county, and resulted in a judgment in favor of the plaintiff for $1,000. On appeal, the judgment was affirmed in the appellate court, and on further appeal affirmed in this court. At the March term of the same court, the other case, brought to recover for the death of Lewis W. Slater, was tried, and resulted in a judgment in favor of plaintiff for $1,350, which was also affirmed in the appellate court, and the railroad company has prosecuted this appeal. Case stated.

The first count of the declaration alleged that on August 24, 1886, defendant possessed and operated a railroad through the county of Ogle, over a public highway running east and west on section line between sections 4 and 9, township 23, range 8; that Lewis W. Slater was then, with all due care, riding upon said highway in a wagon drawn by two horses, and with all due care and caution came upon said railroad at said crossing, and while so riding with all due care, across said railroad, at said crossing upon said highway, in said wagon there, defendant then and there, by its servants, so carelessly and improperly drove and managed its locomotive engine and train by running the same at a high and dangerous rate of speed, and by failing to keep a proper watch for

persons about to pass over said crossing, or to give such signals as would apprise such persons, using due care, of the approach of said locomotive engine and train, and by failing and neglecting to stop or endeavor to stop said engine and train so as to prevent injury to said Lewis W. Slater upon said crossing, that by and through said negligence and improper conduct of defendant in that behalf, said engine and train then and there struck said wagon, and said Lewis W. Slater was then and there thrown out of said wagon with force and violence, and against said engine, and was thereby then and there killed; that said Lewis W. Slater left surviving Belford Slater, his father; Ruth A. Slater, his mother; Albert G. Slater, Willis A. Slater, and Roy J. Slater, his brothers; and Sarah M. Slater, his sister and next of kin,—who have been deprived of their means of support and sustained damages.

The declaration contained other counts, but it will not be necessary to refer to them here. The declaration in the other case was in all respects similar to this declaration, except the name of Arthur B. Slater occurred where Lewis W. Slater appears in this declaration.

It will be observed that the same railroad is defendant in each case; the same tortious act led to the death of the two persons; the same father and mother, brothers and sister in each case; the same next of kin and beneficiaries in each case. It will also be noticed that, as the killing of the boys resulted from one and the same transaction in the trial of the first case, the evidence in reference to the death of Lewis W. Slater, the deceased in this case, was all gone over and introduced before the jury. Indeed, it was impossible for the plaintiff to prove the death in the one case without at the same time, and by the same evidence, proving the death in the other case; or to establish a cause of action in the one case without at the same time, by the same evidence, proving the facts which led to a recovery in the other. Under these particular facts, it is insisted by counsel for the railroad company, with much earnestness, that the judgment in the first cause is a bar to this action.

Res Judicata —Judgment in first action not a bar.

The law is well settled, not only by text-writers, but by the decisions of numerous courts of last resort, that a judgment in a civil proceeding, based upon a certain cause of action, is binding and conclusive on the parties to the proceeding, and another suit or proceeding cannot be maintained upon the same cause of action. Trask *v.* Hartford & N. H. R. Co., 2 Allen (Mass.), 331. "The law does not tolerate a second judgment for the same thing, between the same

parties, whether the claim is upon a contract or tort." "The general rule is that it is against the policy of the law to permit a plaintiff to prosecute in a second action for what was included in and might have been recovered in the first, because it would harass the defendant, and expose him to double costs." Sykes *v.* Gerber, 98 Pa. St. 179, 183. "An entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and, if several suits be brought for different parts of such a claim, a judgment on the merits in either will be available, as a bar in the other suits." Rosenmueller *v.* Lampe, 89 Ill., 212. In the note to Trevivian *v.* Lawrence, 2 Smith, Lead. Cas. 799, it is said: "With regard to the judgment of a court of record *inter partes*, the great maxim which governs its effect is *res inter alios acta alteri nocere non debit.* The rule laid down in the celebrated judgment of DE GREY, C. J., is, it will be recollected, that the judgment is conclusive between the same parties. In Buller's Nisi Prius, 233, the rule, and the reason for the rule, are stated to be that 'the verdict ought to be between the same parties, because otherwise a man might be barred by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert.' To the same effect is Com. Dig. tit. 'Estoppel;' Co. Litt. 353." In the same note the author also says: "It must be observed that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and in fact as a different person in law." There is no trouble in regard to the law of former adjudication. Its principles are well settled. Indeed, opposing counsel do not disagree so much as to what the law is, as they do in regard to its application to the facts of this case. We have, however, after mature consideration of the question, arrived at the conclusion that the former action is not a bar to the present one. The parties were not the same in the two actions, the defendant was the same in both actions, and the beneficiaries were the same, but in the former suit the plaintiff was the administrator of the estate of Arthur B. Slater, deceased. As such administrator he sued, and as such administrator he recovered, while in the present action the plaintiff sues as the administrator of the estate of Lewis W. Slater, deceased. The two plaintiffs have no interest or connection whatever with each other. They are as separate and distinct as if the plaintiff in the first case had been William Smith, administrator of the estate of Silas Huber, and in the second case had been William Smith, administrator of

the estate of John Jones. The beneficiaries have no bearing on the question. They are not plaintiffs in the action, but, under the statute, the administrator is made a plaintiff in his representative character as such.

Counsel have cited section 259 of Freeman on Judgments, where the author says: "The best and most unvariable test, as to whether a former judgment is at bar, is to inquire whether the same evidence will sustain both the present and the former action." Suppose, on the trial of the former case—where the action was brought to recover for the negligent killing of Arthur B. Slater—the plaintiff had proven that Lewis W. Slater came to his death by the negligent operation of defendant's trains, and that he was administrator of the estate of Lewis W. Slater, who had next of kin; could a verdict on such evidence be rendered for the plaintiff in the former action? The answer is apparent that no recovery could be had in that case on such evidence, and yet it will not be denied that such evidence would make out a *prima facie* case, upon which a verdict and judgment might be rendered in the latter case. The fact is therefore apparent that the same evidence would not support both actions. In the former case, it was necessary to establish that Arthur B. Slater, while in the exercise of ordinary care, was killed through the negligence of defendant; while in the present action it devolved upon the plaintiff to prove that Lewis W. Slater, while in the exercise of ordinary care, came to his death through the negligence of the defendant. The fact that both of these parties came to their death at the same time, and from one and the same accident, is a matter of no particular moment, and has no special bearing upon the question involved. Here the plaintiffs were different in the two actions. The subject-matter was not the same, and the question involved in this case was not litigated in the former one; and we are aware of no well-settled principle upon which it can be held that the former action is a bar to the present one.

It is next claimed that the court erred in refusing its instructions 17 and 18. No. 17, in substance, informed the jury that it was not a want of ordinary care for a train of cars to approach a highway crossing at its usual speed, although there is a team approaching. On a trial of a case of this character, negligence is a question of fact for the jury to determine from the evidence, and it is not the province of the court to tell the jury in an instruction that one thing is negligence and another not; but the jury should be left free and untrammeled, to determine from all the evidence who has been negligent and who has

Instructions considered.

not. No. 18 informed the jury that an engineer has a right to presume that a team approaching a crossing will stop, etc. What has been said in regard to 17 will also apply here. It was improper for the court to say, as a matter of law, that the conductor might presume anything. Presumptions had nothing to do with the question involved. The deceased had lost his life in crossing the railroad track, and the question was whether the negligence of the defendant contributed to the injury, the deceased having exercised ordinary care.

It is also said the court erred in refusing defendant's instruction 27. In substance, it directed the jury that if they believed from the evidence that the person in charge of the team stopped forty or fifty feet from the railroad track, and the horses afterwards became unmanageable and ran upon the track, defendant was not responsible for the action of the horses, or for any damage to them. What damage, if any, was done to the horses was not involved in the action, as the suit was not brought to recover for damages to the horses or wagon; and upon this ground alone the action of the court in refusing the instruction might be placed. But, aside from this, the instruction was liable to mislead the jury. Whether the defendant was responsible for what the horses did was a question of fact, to be determined from a consideration by the jury of all the facts and circumstances which occurred at the time.

It is also claimed that the court erred in giving plaintiff's third and fourth instructions. Instructions like these were given in Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, and they were approved by this court. The decision in that case is conclusive of the question now raised.

Evidence as to ringing of bell.

It is also claimed that the court erred in permitting certain witnesses to testify that they would have heard the bell if it had been rung. The admissibility of this character of evidence arose in Chicago & A. R. *v.* Dillon, 123 Ill. 570, 32 Am. & Eng. R. Cas. 1, and it was there held that the admission of such evidence was not error.

Absent witness—Holding case open.

It appears from the record that on Saturday morning of the week when the cause was tried the evidence had all been introduced by both parties, except the defendant desired to call Mr. and Mrs. Shaffer on a single point. These witnesses were not, however, in court, and would not arrive until 11.10 that forenoon; and counsel for defendant requested the court to hold the case open for the introduction of evidence, until the witnesses could arrive on that day, or allow

counsel the right to call the witnesses on the following Monday, and examine them at that time; but the court refused the request of counsel, and this ruling is relied upon as error. We would have been better satisfied with the ruling of the court if counsel had been allowed to examine the witnesses after their arrival on that day, or on the following Monday; but whether the court would wait for witnesses to arrive, and allow the case to stand open, and permit the evidence to be introduced after the witnesses shall arrive, was a matter resting in the discretion of the court; and the refusal of the court to exercise that discretion in defendant's favor is not ground for a reversal of the judgment. The judgment of the appellate court will be affirmed.

Excessive Speed of Trains at Crossings—Liability of Company.

When Speed of Train is Material.—In actions for injuries received at railroad crossings, where it is alleged that the locomotive had no headlight burning, and that no whistle was sounded or bell rung, the question of the speed of the train may be material, and a charge to the jury that it is immaterial is properly refused. Thomas *v.* Chicago & G. T. R. Co., 86 Mich. 496.

Passing Crossing at High Speed Without Giving Signal. -In Beanstrom *v.* Northern Pacific R. Co., 46 Minn. 193, evidence that a railroad train crossed the principal thoroughfare of a village at the rate of twenty-five or thirty miles an hour, without giving any signal of its approach except a whistle three-fourths of a mile away, and that the opportunities of seeing or hearing a train were greatly obstructed,—was held sufficient to justify a finding of negligence on the part of the company.

Duty of Company at Dangerous Crossing.—Where there is evidence that a railroad crossing was dangerous and was approached by a train at a very high rate of speed, it was not error to refuse to charge that the company performed its whole duty, in connection with the approach of the train to the crossing, if the whistle was sounded and the bell rung at a proper distance therefrom. Negligence being the absence of care according to the circumstances, it must be measured by the apparent danger. The character of such a crossing necessarily affects the duties of the railroad company towards travelers upon the public highway, and its trains must pass over dangerous crossings at a less rate of speed, proportionate to the danger. Ellis *v.* Lake Shore & M. S. R. Co., 138 Pa. St. 506.

What Constitutes Excessive Speed.—Forty or forty-five miles an hour is not an excessive speed at which to approach a railroad crossing in the country, where the train which is running at that speed has a whistle and a bell which can be heard at the distance of a mile at least. Griffith *v.* Baltimore & O. R. Co., 44 Fed. Rep. 574.

Competency of Witness to Testify as to Rate of Speed.—A witness, who has lived within a few rods of a railroad for eight years, is competent to testify as to the speed of a train, although he states that his estimates are based partly on what others have told him. And one who testifies that he has often timed trains is a competent witness as to their speed. Thomas *v.* Chicago & G. T. R. Co., 86 Mich. 496.

Measure of Care Required of Railroad Company at Crossing.—In Ohio & M. R. Co. *v.* Buck (Ind., Feb. 6, 1892), 30 N. E. Rep. 19, which was an action against a railway company to recover damages for injuries re-

ceived at a crossing, it appeared that the lower court instructed the jury that it was the defendant's duty to exercise "a high degree of care" in approaching the crossing. The court then explained to the jury what amount of care was required. *Held*, that it could not be said that the jury were misled by the instruction.

It is the duty of a railroad company to use "great" care and prudence in operating trains in streets or at public crossings. Galveston, H. & S. A. R. Co. *v.* Matula, 79 Tex. 577.

Duty of Company at Crossing Where There is a Large Number of Tracks.—In Lake Shore & M. S. R. Co. *v.* Johnson, (Ill., Jan. 22, 1891), 26 N. E. Rep. 510, it was said that railroad companies must observe unusual care and take extra precautions to avoid injury to persons passing along the streets or sidewalks, when they cover a public street with a large number of tracks.

Reciprocal Duties to Traveler and Company at Crossing.—A traveler and a railroad company when using a public highway in common must each look out for the presence of the other; one to avoid being injured and the other to avoid inflicting injury. Hanlon *v.* Missouri Pacific R. Co., 104 Mo. 381.

Burden of Proof in Action for Injury at Crossing—Preponderance of Evidence.—The mere fact that plaintiff was injured by a train at a railroad crossing is not of itself sufficient to entitle him to recover damages therefor against the railroad company, but the burden is on him to show by a preponderance of evidence that the accident was due to some negligence on the part of the company. By the requirement that negligence shall be established by a preponderance of evidence, it is intended that the evidence adduced to show such negligence shall make a stronger impression on the jnry than that produced to rebut it, without regard to the mere number of witnesses who testify to the facts on either side. Griffith *v.* Baltimore & O. R. Co., 44 Fed. Rep. 574.

Negligence of Company in Permitting View of Track to Become Obstructed at Crossing.—Where there is no statute which provides that a railroad company shall not permit an accumulation of cars upon its side tracks at a crossing so as to obstruct the hearing or view of an approaching train, it is error to instruct the jury that such an act constitutes negligence. It is for the jury to say, under proper instructions, whether the acts of a railroad company, in leaving cars at a crossing, are negligent or not. Dillingham *v.* Parker, 80 Tex. 572.

It is not negligence *per se* for a railroad company to leave freight cars upon a side track in a thickly settled portion of a city so as to obstruct the view of one approaching the crossing; but a finding by the trial court that such conduct was negligent, under the circumstances, will be affirmed on appeal when supported by the evidence. Receivers Houston & T. C. R. Co. *v.* Stewart, (Tex., June 23, 1891), 17 S. W. Rep. 33.

Duty of Engineer Discovering Person on Track—Negligent Error of Judgment.—A locomotive engineer is not entitled to assume in all cases that persons on a public crossing will get off in time to save themselves. In running a train at a public crossing in a city he is bound to observe reasonable diligence, before he discovers peril as well as afterwards; and the company is responsible for his negligent errors of judgment. Georgia Midland & G. R. Co. *v.* Evans, 87 Ga. 673.

Duty of Engineer to Stop His Engine on Seeing Travelers Approach.—It is the duty of a locomotive engineer to stop his engine when he sees a horse attached to a covered wagon approaching a crossing, and can see that the occupants of such wagon are not on the lookout. Hinkle *v.* Richmond & D. R. Co., (N. Car. Nov. 24, 1891), 13 S. E. Rep. 884.

Negligent Management of Engine—Engine in Charge of Brakeman.—In an action for injuries received at a crossing the fact that the locomotive of the defendant was in charge of a brakeman whose duty did not include the management of the engine, does not relieve the company from liability, if it appears that the fireman was on the engine while it was being moved by the brakeman. Dillingham *v.* Parker, 80 Tex. 572.

Horse Balking and Backing on to Track After Once Crossing It—Liability of Company.—Where a plaintiff, acquainted with a crossing, and aware that the place was used for shifting cars, was seen by the engineer of the shifter, that had just passed, to drive his one-horse wagon safely across the track within a few feet of the shifter, the horse not noticing it, and to proceed some nine feet from the track, when, the engineer not observing, the horse balked and backed the wagon onto the track into collision with the shifter, which, having coupled on to a train of cars, was backing down the track, whereby injury resulted to wagon, horse and plaintiff. *Held*, error to refuse to set aside the verdict for the plaintiff as not warranted by the evidence. Richmond & D. R. Co. *v.* Yeamans, 86 Va. 860.

Overturning of Carriage at Crossing - Gate Striking Horse—Breaking of Rein in Attempt to Control Horse. - In Phillips *v.* New York Central & H. R. R. Co., 127 N. Y. 657, it was held that the mere breaking of a rein, in attempting to control a horse which has been frightened by the negligent lowering of a gate at a railroad crossing so as to strike him, will not relieve the company from liability for injuries received by the overturning of the carriage, in the absence of proof that the rein was defective, although it appeared that no injury would have resulted but for its breaking. The court said: "The jury specifically found that the gate was then being lowered, and did hit the horse; and it may be assumed that they also found that this rendered the horse unmanageable, and caused the situation from which resulted the calamity, although the immediate cause may have been the inability of the driver to control the course of the horse, occasioned by the breaking of the rein, thus causing or permitting him to make so short a turn as to upset the wagon, and throw the plaintiff out of it. The facts so found may have been a proximate cause of the injury, and it may be that they produced a condition which required strong reins for protection against the injury which followed. This was not, therefore, necessarily attributable solely to the breaking of the rein, which may have been one of two proximate causes, and in that view, if the latter occurred without fault of the plaintiff, she would not be denied the right of recovery. Ring *v.* City of Cohoes, 77 N. Y. 83. There is no support for imputation of negligence to the plaintiff. She was a mere passenger with the driver of the horse, and, if any fault was attributable to him, she was not charged with it. Robinson *v.* New York Cent. & H. R. R. Co., 66 N. Y. 11; Dyer *v.* Erie R. Co., 71 N. Y. 228. It is difficult to disconnect the breaking of one of the lines used to control the horse from the situation which, in view of the facts specially found, caused the unusual strain upon them for the management of the animal; and without the application of those facts there was in the view of the court nothing to charge the defendant with negligence and liability. If, however, the breaking of the rein, whether defective or not, was the sole proximate cause of the injury, the plaintiff could not recover. But the conclusion of the proposition which the court was requested to charge was made dependent upon the fact that the rein was found to have been defective, and for that reason not adequate to the use which the situation produced by the causes before mentioned required. It may be assumed that, if the request had been to charge that if the breaking of it was the only proximate cause of the injury the plaintiff could not recover, the court would have so instructed the jury; and, treating the import of the proposition

which the court was requested to submit to the jury such as to direct their attention to the sole proximate cause of the calamity, the question arises whether there was any support for the suggestion that the rein was defective. The break was concededly a fresh one, and, so far as appeared by the evidence, the rein was in good condition. There was no opportunity to impute negligence to the driver for using the lines in driving the horse, and the breaking of it may be accounted for by the strength applied in suddenly jerking upon the line to control the horse on the occasion. It may be that reins larger and stronger could have been procured, but that did not characterize this one as defective."

Traveler Shut in Between Tracks of Two Companies—Sufficiency of Gates—Warning to Traveler.—In an action against a railroad company for the death of plaintiff's intestate, it appeared that at the place where he was killed defendant's and another road crossed a street within a few feet of each other; that deceased was riding on an ice-cart; that the driver thereof had no warning of an approaching train until he was on the tracks of the other road; that he was ordered by the gateman of the other road not to back his team; that defendant's gates were shut down before him, and he could not go on; that the horses became unmanageable, and broke through defendant's gates, and were struck by an engine of defendant's approaching at the rate of twenty miles per hour. *Held*, that the question of defendant's negligence was for the jury. Marks *v.* Fitchburg R. Co., (Mass., Feb. 24, 1892), 29 N. E. Rep. 1148.

Crossing Switch-yards at Place not a Public Crossing.—In Bradley *v.* San Antonio & A. P. R. Co., 80 Tex. 84, it was held that one who is struck by cars, while crossing the switch-yards of a railroad company, of which he was not an employe, at a place not a public crossing, is not entitled to recover, and a verdict for the company will not be disturbed.

Ordinances Regulating Crossing—Negligence of Company in Failing to Observe.—In Denver & R. G. R. Co., (Colo., Nov. 16, 1891), 28 Pac. Rep. 79, it was held that municipal ordinances requiring the ringing of the locomotive bell whenever a steam engine was approaching a crossing of a public street, and requiring the presence of a flagman at important crossings, to the end that people may seasonably and suitably be warned of the approach of trains, are reasonable and proper regulations; and a failure by a railway company to observe such ordinances is negligence.

Pleading—Negligent Management of Train—Evidence.—In an action for injuries received at a crossing, an allegation that the defendant company negligently managed its train, warrants evidence to prove its negligence in not stopping the train after its employes saw plaintiff on the track. Hanlon *v.* Missouri Pacific R. Co., 104 Mo. 381.

Same—Motion to Make Complaint More Definite.—In Schneider *v.* Wisconsin Central R. Co., (Wis. Feb. 23, 1892), 51 N. W. Rep. 582, which was an action for the negligent killing of plaintiff's intestate at a railroad crossing, a motion to make the complaint more definite and certain, by specifying for what distance north of the track the view of the train, which collided with the intestate, was obscured, and also by specifying the direction from which the intestate was approaching the track at the time of the accident, was held to have been properly refused.

Statutory Presumption of Negligence—Pleading—Failure to Allege Want of Contributory Negligence.—Under Code, Ga., negligence of a railroad company being presumed when injury by the running of its train is shown, it is not necessary for a father, suing for loss of the services of his minor son, not an employe of the company, who was killed on a public crossing, to allege in his declaration either that he or the son was in the exercise of due care or was without fault. Georgia Midland & G. R. Co. *v.* Evans, 87 Ga. 673.

LOUISVILLE & NASHVILLE R. CO.

v.

WALLACE.

(*Tennessee Supreme Court, December 12, 1891.*)

Personal Injuries—Interest on Damages.—In an action to recover damages for personal injuries the jury should give a sum in gross to include all the compensation up to the date of judgment, and it is error to allow interest on the amount recovered for time prior to the judgment.

APPEAL from Sumner Circuit Court.

Action for personal injuries. Judgment for plaintiff and defendant appeals.

J. J. Turner, for plaintiff.

S. F. Wilson, *R. K. Gillespie* and *George Roddie*, for defendant.

SNODGRASS, J.—The defendant in error, while in the service of the Louisville & Nashville Railroad Company as brakeman, sustained severe personal injury, resulting in the loss of a leg, which he alleged was occasioned by the negligence of the company. He sued for $15,000 damages and recovered judgment for $9,940. The company appealed and assigned numerous errors. It is not deemed material to notice but one of them, as the others are not well taken and involve nothing new, so as to make their consideration in a written opinion necessary.

Case stated.

The one material to be considered relates to the question of interest. The court told the jury it could assess plaintiff's damages with or without interest, as the jury should see proper, in connection with instructions as to the measure of damages not otherwise complained of. The verdict assessed the damages at $7,000 with seven years' interest $2,940, aggregating $9,940. It is objected in the assignment of errors that the charge on this question and verdict, with judgment thereon, are erroneous. This involves a consideration of the question, what is the true measure of damages for such personal injury? The rule for determining damages for injuries not resulting in death (where the statute fixes the measure), and not calling for exemplary punishment, deducible

Interest on damages cannot be recovered.

from the decisions of this court since its organization in this state, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability in health, mind or person thereby occasioned. And this is the rule most consonant to reason adopted in other states. 3 Sedg. Dam. (8th ed.) § 481 *et seq.*; 5 Am. & Eng. Enc. Law, pp. 40–44, and notes; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260. As this sum in gross includes all the compensation which is requisite to cover pain, suffering and disability to date of judgment, and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and courts will make the sum given in gross a fair and just compensation, and one in full of amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing suffering and disability, just as, when given late, it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are items considered to make up the aggregate then due, and the gross sum then for the first time judicially ascertained.

The error of the court below was in the assumption that a like measure of damages is applied in this class of cases as in that of injury to property effecting its destruction or conversion or other unlawful or fraudulent misappropriation, or detention of property or money, in which the rule applied by the circuit judge is held to be a proper one; not on the theory, even in this class of cases, that interest as such is due, but that the plaintiff is entitled to the fixed sum of money or definite money value of property converted or destroyed, and the jury may give as damages an amount equal to interest on the value of the property. But such rule applies alone to such cases, and not to that of personal injury, which does not cease when inflicted, and is not susceptible of definite and accurate compensation. It never creates a debt, nor becomes one, until it is judicially ascertained and determined. Only from that time can it draw interest; and interest or damages cannot at any preceding time be added to it without changing and superadding a new element, never given in this state or any other in a similar case, so far as our investigation has discovered.

The counsel of plaintiff, who cite many authorities sup-

posed to be in support of the ruling below, were doubtless misled by the generality of terms used in some of them. Under the head of "Interest," after stating that "it was generally allowed by law on two grounds, namely, on contract, expressed or implied, or by way of damages either for default in payment of a debt or for a use or benefit derived from the money of another," it is stated in 11 Am. & Eng. Enc. Law that "where it is imposed to punish tortious, negligent or fraudulent conduct, it is a question within the discretion of the jury." Page 380. For this proposition various authorities are cited, including Mr. Sedgwick on Damages, p. 374 (the reference being to paging of the fifth or earlier edition). This author uses similar general terms, but neither was speaking of cases of personal injury, but of the class of cases to which we have referred, as fully appears from Mr. Sedgwick's further discussion of this general head, on pages 385, 386, and as most clearly appears from a reference to the authorities cited by both, which relate to cases of trover and trespass and to property controversies only. In neither of these books is the proposition now thought to be sustained by them advanced—that the measure of damages for a personal injury includes damages for detention of the supposed amount due. The generality of statement indulged in that and former editions of this work is corrected by editors of the last edition. Chapter 10 of the first volume of this edition is devoted to interest allowed in actions where it is by rule of law, or in the discretion of the jury or court trying the case, allowed as part of the measure of damages. In these cases are enumerated and discussed those actions sounding in tort in which interest may be given as damages. The distinction is there taken, as taken here, and actions for personal injuries excluded, because of the existence of a wholly different measure of damages respecting them. In this connection we quote section 320 in the volume and chapter referred to: "It sufficiently appears, from what has already been said, that there is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that we find the clearest cases for disallowance of interest. There are many cases which are not brought to recover a sum of money representing a property loss of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions. It is certainly not

Same—Authorities reviewed.

allowed in such actions as assault and battery or for personal injury by negligence, libel, slander, seduction," etc. The measure of damage in such case seems nowhere to include this or be based upon this idea. Even in respect to injury or destruction of property, when the supreme court of the United States has adopted fully the prevailing rule allowing damages in the form of interest on value of the property, the rule has been limited to such injury of property or property right as had a fixed or certain value; and it is accordingly held in that court that indefinite damages, as that resulting from infringement of a patent, could not bear interest until after the amount had been judicially ascertained. Tilghman *v.* Proctor, 125 U. S. 161.

The direct question we are considering also came before the supreme judicial court of Maine, and it was there held that the rule permitting damages equal to interest on value of property in cases of trespass and trover did not apply, and that interest could not be allowed upon a recovery for personal injury, and that, too, under a statute authorizing a recovery "to the amount of the damage sustained." (This is not material, however, as their statute gave no more nor less right than exists here.) Sargent *v.* Hampden, 38 Me. 581.

The cases cited by the editors of the last edition of Sedgwick on Damages sustaining the proposition that interest cannot be included in a recovery of damages for personal injuries are from Georgia and Pennsylvania. Ratteree *v.* Chapman, 79 Ga. 574; Western & A. R. Co. *v.* Young, 81 Ga. 397, 37 Am. & Eng. R. Cas. 489; Pittsburgh Southern R. Co. *v.* Taylor, 104 Pa. St. 306. These cases have all been examined and fully sustain the text. One of the cases cited to the proposition in Am. & Eng. Enc. Law was a Pennsylvania case, earlier than either of those to which we have referred. The case there cited (Fasholt *v.* Reed, 16 S. & R. [Pa.] 266) which we have not been able to find in libraries here, was evidently not one of personal injury, or else not consistent with later holdings of that court. Indeed, the Pennsylvania court seems hardly to have gone as far on that question in reference to allowance of interest as damages in other actions *ex delicto* as other courts. In suits for the destruction of property that court has held that, while lapse of time may be looked to, it is error to instruct the jury that plaintiff is entitled to interest on such damage from the time it occurred. Township of Plymouth *v.* Graver, 125 Pa. St. 24; Emerson *v.* Schoonmaker, 135 Pa. St. 437. Of the other cases cited in Am. & Eng. Enc. Law, we have examined those in 13 Wis. 31 (Hinckley *v.* Beckwith), 36 N. Y. 639 (Vandevoort *v.* Gould), and 30 Tex. 349 (Wolfe *v.* Lacy). They all

sustain the text as it is intended to be understood, and as we have herein explained, and doubtless the other cases do so. To the same effect are the cases of Lincoln *v.* Claflin, 7 Wall. (U. S.) 132; Dyer *v.* National Steam Navigation Co., 118 U. S. 507; U. S. *v.* North Carolina, 136 U. S. 211; Clement *v.* Spear, 56 Vt. 401; and cases from American decisions and reports cited in Rapalje's Digest, vol. 1, pp. 1039–1041, under heads "Trover," and "When Interest may be Added," and vol. 2, p. 1991, under head of "Interest." See, also, 1 Sedg. Dam. §§ 432–493 (8th ed.). The effect and meaning of statements quoted from Am. & Eng. Enc. Law, and its reference to Sedg. Dam. are made perfectly clear when these cases and authorities herein added are examined, and the generality of expressions limited to the purpose of their use and the class of cases being considered. They were not dealing at all, nor intended to be understood as dealing with the question of recovery for personal injuries, which is itself a recovery of damages pure and simple, and measured by a rule which needs no supplement that would add damages to damages. The charge and verdict were therefore erroneous on this point, and prejudicial to defendant to the extent and only to the extent of the injury.

The circuit judge might have refused to receive the verdict as to interest, and the same effect may now follow a remitting of the interest by plaintiff, if he elects to do so. In that event the plaintiff is entitled to a judgment for $7,000, with interest from date of its rendition, and costs, and with this modification the judgment will be affirmed. This was the practice adopted in the Maine case on this point, as well as in one of the Pennsylvania cases (135 Pa. St. 437), citing several others, and is clearly the correct rule. In default of such remission, a new trial will be granted.

Interest on Damages in Actions for Personal Injuries.—Interest cannot be added by the jury in their discretion to discretionary damages awarded by them for a personal injury. It is only specific damages, computable upon direct or indirect evidence of actual values, that can be thus increased. Western & A. R. Co. *v.* Young, 81 Ga. 397, 37 Am. & Eng. R. Cas. 489; Pittsburg S. R. Co. *v.* Taylor, 104 Pa. St. 306. Under a statute in North Dakota, however, the jury are allowed to award interest in actions for damages for negligence. Ell *v.* Northern Pacific R. Co. (N. Dak.), 48 Am. & Eng. R. Cas. 381.

Excessive Damages for Personal Injuries.—A verdict for $5,000 will not be set aside as excessive, in an action for personal injuries, where the evidence shows that the plaintiff was confined to his house three weeks, that both of his sides were compressed with pneumonia; that up to the time of the trial he was unable to work and suffered continual pain, and also that the injury might be permanent. Hanlon *v.* Missouri Pacific R. Co., 104 Mo. 318.

In Wesley *v.* Chicago St. P. & K. C. R. Co., (Iowa, Jan. 30, 1892), 51 N. W. Rep. 163, it was held that a recovery of $3.000 is not excessive where there was evidence, although conflicting, that the plaintiff received injuries which permanently impaired his ability to perform manual labor to which he was accustomed, aside from injury to his property.

Limitation of Action for Personal Injuries.—In Mississippi it is held that a statute requiring actions for assault, battery, maiming, false imprisonment, malicious arrest, etc., to be brought within a year, does not apply to actions against companies for personal injuries caused by their negligence. Bell *v.* Kansas City, M. & B. R. Co., 68 Miss. 19.

Personal Injuries—Opinion Evidence of Physician as to Cause of Injuries.—A physician, testifying as an expert as to the nature and extent of plaintiff's injuries, after a personal examination, may state his opinion that they were caused by a fall, but not that they were caused by a fall from a horse at a particular railroad crossing described in the complaint, when he knows nothing of the facts. Patterson *v.* South & North Ala. R. Co., 89 Ala. 318.

Injury Causing Disease—Testimony of Physician—Question for Jury.—Where, in an action for personal injuries caused by the negligence of a railroad, the physician who examined plaintiff after the accident testified that he found evidence of compression of the chest and pneumonia arising from the compression which involved both lungs, and where it appears that the malady from which plaintiff suffered both before and at the trial was superinduced by the pneumonia arising from the injuries, such evidence was sufficient to authorize the finding of the jury that plaintiff's malady was caused by the injuries received in the accident. Hanlon *v.* Missouri Pacific R. Co., 104 Mo. 381.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

v.

LILLY.

(*Tennessee Supreme Court, September Term, 1891.*)

Action for Death—Absence of Kindred—Abatement of Action.—It is only where there is a widow or next of kin to receive the benefit that an action to recover damages for a wrongful death will lie, under a statute providing that the right of action, which a person who dies from injuries received would have had against the wrong-doer in case death had not ensued, shall not abate by his death "but shall pass to his widow, and in case there is no widow to his children or to his personal representatives for the benefit of his widow or next of kin, free from the claim of creditors."

ERROR to Hamblen Circuit Court.

Action for the killing of plaintiff's intestate. Judgment for plaintiff. Defendant brings error.

W. S. Dickson and *J. K. Shields*, for plaintiff in error.

O. C. King and *J. F. Lafferty*, for defendant in error.

CALDWELL, J.—Thomas B. Lilly, as administrator, brought this action against the East Tennessee, Virginia & Georgia Railroad Company to recover damages for the alleged wrongful killing of his intestate, Luther Lilly, deceased. Trial before court and jury resulted in verdict and judgment for $1,500 in favor of the plaintiff, and defendant appealed in error.

Case stated.

The only question for the consideration of this court arises on the pleadings and the action of the trial judge thereon. To the plaintiff's declaration, which was good both in form and substance, the defendant filed a plea, wherein it was averred that Luther Lilly, plaintiff's intestate, left surviving him no widow, child, or next of kin to take the recovery sought, and that, therefore, the action would not lie. Plaintiff replied that, though there were no widow, child, or next of kin, the action would lie for the benefit of creditors of the deceased, and in the absence of creditors, for the benefit of the state. The defendant demurred to this replication as presenting an unsound proposition of law. The action of the court in overruling that demurrer is assigned as error.

The artifical rule of the common law, that every right of action for personal injury died with the person injured prevailed in the state until changed by the Act of 1851, chap. 17. Trafford *v.* Adams Express Co., 8 Lea (Tenn.), 97, 98. That act, as amended by the Act of 1871, chap. 78, provides that "the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrong-doer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors." Mill & V. Code, § 3130. This statute is largely a counterpart of the first and second sections of what is familiarly known as "Lord Campbell's Act," passed by the British parliament in the year 1846 (St. 9 and 10 Vict., chap. 93, §§ 1, 2), and is very similar to statutes subsequently enacted by many of the American states. It manifestly abrogates the common law rule just mentioned, and keeps alive the deceased person's right of action in every instance in which he leaves surviving a widow or child or next of kin. Whether it goes beyond that, and includes every case of wrongful killing without reference to the existence of kindred, is the controverted question. The statute virtually creates a liability in favor of the widow or next of kin which did not exist at

Action not maintainable where there are no kindred.

common law; hence the courts will not extend or enlarge that liability by liberality of construction, but will confine it to cases clearly within the provisions of the act. No right of action will be inferred, no remedy will be given in favor of any persons, except those distinctly contemplated as beneficiaries. The very comprehensive language, "the right of action * * * shall not abate or be extinguished," standing by itself would undoubtedly embrace every case of wrongful killing. That which follows, however, qualifies the preceding words, and restricts the provision to cases in which there is a widow or next of kin to be benefited. The right of action that shall not abate or be extinguished by the death of the injured person is the one which "shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or his next of kin." It follows that any right of action which cannot so pass for lack of widow or next of kin to take the benefit of the recovery is not within the provision of the statute, but must abate or be extinguished as at common law.

The object of the act was to confer a benefit upon the widow and next of kin of the deceased, to give them a right of action which otherwise they would not have had. The provision is not in favor of the estate proper of the deceased person. By express declaration of the statute the proceeds of the recovery are to be "free from the claims of creditors." No more is the provision in favor of the state, as averred in the replication. Not only is there no reference to the state in the statute, but it can hardly be conceived that the legislature would have exempted such a fund from the creditors of a deceased citizen, intending that it should escheat to the state. It is only where there is a widow or next of kin to receive the benefit that the rule of the common law is abrogated. Where there are no such kindred to become beneficiaries, the statute does not apply, and the right of action abates, now as formerly, with the death of the injured person.

The correctness of this construction is rendered the more manifest by reference to the act of 1883, chap. 186, wherein it is enacted that the recovery shall be not only for the damages sustained by the deceased, but shall include "also the damages resulting to the parties for whose use and benefit the right of action survives." Mill & V. Code, § 3134. Thereby is it shown that "the parties" contemplated as beneficiaries were those sustaining such a relation to the deceased as to suffer personal damage by his death, as do his widow and next of kin, and as do not his credit-

ors or the state. The person whose right of action shall not abate or be extinguished by death may be an infant in its mother's arms (Railway Co. *v.* Connor, 9 Heisk. (Tenn.) 19), or a married woman (Beam *v.* Brown, 5 Cold. (Tenn.) 168); and in the latter case the husband, if living, is entitled to the recovery, upon the ground that the word "widow," as used in the statute, includes both the feminine and the masculine gender, and means either widow or widower, as the case may be (Trafford *v.* Adams Express Co., 8 Lea. (Tenn.) 96). We infer such to have been the ground of the last decision (as it might well have been under section 50 of the Code), though it is not precisely stated in the opinion upon what ground the majority of the court concurred in the ruling. *Id.* § 112.

The circuit judge erred in overruling the demurrer to the replication. For that error the judgment is reversed, and the case remanded for further proceedings.

Action for Death—Necessity for Existence of Surviving Kindred.—In order that an administrator may recover substantial damages for the death of his intestate there must be some person entitled to inherit under the statute of distribution. James *v.* Richmond & D. R. Co. (Ala.), 48 Am. & Eng. R. Cas. 522; Serensen *v.* Northern Pacific R. Co., 45 Fed. Rep. 407; Stewart *v.* Terre Haute & I. R. Co. (Ind.), 21 Am. & Eng. R. Cas. 209. But, under the North Carolina statute, if there be no next of kin entitled to recover, the damages go to the University. Warner *v.* Western North Carolina R. Co. (N. Car.), 25 Am. & Eng. R. Cas. 432.

Action for Death—Transitory Action—Remedy of Non-Residents.—The right of action for damages given by Gen. St. Ky. chap. 57, p. 550, to the personal representative of "any person" whose life is lost by the negligence of a railroad company, etc., to be pursued "in the same manner that the person himself might have done for any injury where death did not ensue," is not confined to decedents who were citizens or residents of Kentucky, nor to personal representatives appointed in and by the state of Kentucky. Marvin *v.* Mayville Street R. & T. Co., 49 Fed. Rep. 436.

Death Caused by Gross Negligence—Instructions.—Where a right of action for the wrongful death of another, caused by the gross negligence of a railroad company, is given by statute, it is reversible error, in a suit brought under such statute, to omit to charge the jury that a recovery cannot be had unless the defendant was guilty of gross negligence, and to give them a definition of gross negligence. Galveston, H. & S. A. R. Co. *v.* Cook (Tex., June 9, 1891), 16 S. W. Rep. 1038.

Pain and Suffering of Deceased as Elements of Damage.—Damages for the pain and suffering of the deceased are not permissible in an action for his wrongful death, where such action is commenced by his administrator. Dwyer *v.* Chicago, St. Paul, M. & O. R. Co. (Iowa, Feb. 1, 1892), 51 N. W. Rep. 244.

Death of Child—Damages Recoverable by Parent—Kindness and Attention to Family.—In an action by a father for the death of his child it is not error to instruct the jury that in estimating his damages they may consider the condition of his family at the time of the accident, take into account the services the child might reasonably have performed in the family until it attained its majority, including actual labor in helping to

carry on the household affairs, the pecuniary acts of kindness and attention which might reasonably be anticipated that it would have performed which would administer to the family's comfort as well as their necessities, if accompanied by the statement that they cannot consider the fact that the father has been deprived of the happiness, comfort and society of his child, nor acts of affection simply and loss of companionship, and that the recovery is limited by law to the actual pecuniary loss. Louisville, New Albany & C. R. Co. *v.* Rush, 127 Ind. 545.

ROSS, *et al.*

v.

KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. CO.

(*Missouri Supreme Court, May 23, 1892.*)

Carriers—Overcharges—"Carload" of Cord Wood.—In construing a statute fixing the rate for the transportation of cord wood at not exceeding $8 "per car load," the courts will be guided by the long standing and generally received ruling of the railroad commissioners that ten tons shall constitute a car load. Accordingly, if a railroad company does not charge to exceed $8 per 20,000 pounds, it is not liable for making overcharges, although it may charge more than $8 where a single car is loaded in excess of ten tons.

ACTION against the Kansas City, St. Joseph & Council Bluffs R. Co. to recover the statutory penalty on account of alleged overcharges paid by plaintiffs for the transportation of cord wood.

Spencer, Burnes & Mosman, for appellant.

James W. Boyd and *Benj. Phillip*, for respondents.

BLACK, J.—The plaintiffs, Ross & Todd, brought this suit to recover the statutory penalty of three times the amount of alleged overcharges paid by them to defendant for hauling several hundred cords of wood to St. Joseph, between the 1st day of July, 1883, and the 25th March, 1886. **Case stated.**

The petition contained 234 counts. Plaintiffs withdrew or took a nonsuit as to some fifty odd counts, and recovered judgment on the others and the defendant appealed.

The proof shows that the cord wood was all shipped from points on the defendant's road to St. Joseph, the distance in all cases being less than twenty-five miles. In some instances the wood was not shipped from any regular station, but from points on the road where it had been piled with the knowledge and consent of the defendant. In such cases the defendant sent out a special train and made a special charge of

$25 for "engine services," in addition to the usual freight charges. As the trial court, by the instructions given, excluded these special charges in computing the overcharges, it is not necessary to give them any further notice.

The defendant made out from time to time, what are called "expense bills," and presented them to the plaintiffs for payment, and they paid the charges thus made. Each of these bills represents a car, and the charges are extended according to the weight of the wood, the price charged for carriage ranging from three and one-half to four cents per 100 pounds. One of these bills will serve as a sample for all. It reads: "Weight, 28,000; rate, 375; total to pay, $10.50.

The defendant put in evidence portions of the "Fourth Annual Report of the Railroad Commissioners of the State of Missouri for the year 1878," addressed to the general assembly. In this report the commissioners say: "The laws of Missouri recognize 2,000 pounds as a ton, but in regard to some articles, particularly iron, custom allowed 2,240 pounds to the ton.

Custom has established ten tons, or 20,000 pounds, as a car load, but in many freights, especially lumber, custom allows twelve tons, or 24,000 pounds to the car. The weight of lumber being estimated from the number of feet. To avoid confusion, therefore, the commissioners published, in connection with their table of classification, that they recognize 2,000 pounds as a legal ton and ten tons as a car load. See appendix C. and D."

The part of "Appendix C" read in evidence is in these words: "Classification of freights established by the railroad commissioners of Missouri.

"This classification to be in force on all of the railroads in Missouri from and after July 10th, 1878.

"Explanations: The classes are 1st, 2d, 3d, 4th, D., E., F., G., H., I. and J., and the expression $1\frac{1}{2}$, D. 1, and 3, mean one and a half times first, double first and three times, first class.

"The commissioners recognize 2,000 pounds as a legal ton and ten tons a car load."

The defendant insists that it had the right and was in duty bound to make its charges in accordance with the construction placed upon the law by the railroad commissioners, fixing ten tons or 20,000 pounds as a car load. If correct in this contention, then this action must fail, for the amount charged did not in any case exceed $8 per 20,000 pounds. The plaintiff insists that when the law speaks of a car load, it means all the wood hauled in one car, and hence the defendant was guilty of making overcharges.

The Act of 1875, which provides for the appointment of a

board of railroad commissioners, divides freights transported into four general classes "to be designated, first, second, third and fourth classes, and into special classes to be designated as classes D., E., F., G., H., I. and J." Section 833, R. S. 1879. The statute does not define what articles shall be included in these general classes, but it is left to the commissioners to make the classifications. The statute, however, declares what shall constitute special classes D., E., G. and H., and it specifies some of the articles which shall go into special classes I. and J. It also fixes the maximum rate of charges upon the special classes. Class D. comprises grain in car loads, and the maximum rate is six cents per 100 pounds for the first twenty-five miles. Class E. comprises flour in lots of fifty barrels or more, and lime in lots of twenty-four barrels or more, and the highest charge allowed is twelve cents per barrel for the first twenty-five miles. Class H. comprises live stock and the maximum rate is $10 per car load. "Class J. shall comprise coal, brick, sand, stone, railroad ties and cord wood, and all heavy fourth class articles in car loads," and it is provided in respect of rates: "Class J. not exceeding $8 per car load for the first twenty-five miles," etc. As the statute itself, and not the commissioners, places cord wood in class J., and fixes the maximum rate at $8 per car load for the first twenty-five miles, the present case resolves itself into the question as to what is meant by a "car load" of cord wood.

It is to be observed in the first place that the statute deals with the movement of the commerce of the country, and must have accorded to it a reasonable and practicable construction in the light of usages existing at the date of the enactment. "A statute applicable to a large trade or business should, if possible, be construed, not according to the strictest and nicest interpretation of the language, but according to a reasonable and business interpretation of it, with regard to the trade or business with which it is dealing." Endlich on the Int. of Stat., Sec. 83.

Rule for construction of statutes.

Again, where such a statute as this has been interpreted by those executive officers whose duty it is to enforce it, and their construction has been acted upon for any considerable time, due regard should be paid to such construction. While the rulings of such officers are not conclusive upon the courts, still their construction of the law is entitled to weight, especially where there is doubt as to the meaning of the law. Says the author just cited, after speaking of the deference paid to the practice in lower courts, "but of almost equal dignity is the practicable construction put upon an act by the government officers particularly charged with its ex-

ecution, especially where so long continued as to have grown into a rule of department practice."

Thus the construction of a statute adopted and acted upon by the executive in the execution of his duty to give effect to the laws, or by the secretary of the treasury, or the construction of the general insurance laws of the state by its Attorney General and other officers required to act under it, will, in case of doubt or ambiguity, be adopted by the courts, or, at least, not disregarded by them, except for cogent reasons. End. on Int. of Stat., § 360 ; Union Ins. Co. *v.* Hoge, 21 How. (U. S.) 35.

Now it must be conceded that a "car load of wood" is a very indefinite expression, and especially so in view of the fact that there is no uniformity whatever in the size and strength of cars. One car will carry only five tons, while another can safely carry twenty tons. If a car load means, for the purposes of making transportation charges, the amount that the car can reasonably and safely carry, as the plaintiffs insist, then the door is opened wide for favoritism and discrimination. The favored shippers will get the large cars and the less fortunate the small ones. This is exactly one of the things which the law in its general scope seeks to prohibit. The general object and purpose of a statute is never to be overlooked in its construction and application. To prevent discrimination and bring about equality and uniformity of rates, the commissioners have power, and it is made their duty to classify freights, except where the statute places named articles in special classes. In promulgating the classification made by them in obedience to law they held and ruled that ten tons should constitute a car load, and this ruling they made in view of what they understand to be the prevailing usage and the object and purpose of the law.

"Car load" means ten tons.

There is, it is true, no evidence of a custom to count ten tons as a car load in this record save the statement made by the commissioners in their report.

Concede that this statement does not establish the existence of such a custom, still the report does show that they gave due consideration to what they understood to be an established usage. They promulgated their ruling in 1878, at least four years before any of the charges now in question were made. They reported their construction of the law to the general assembly late in that year, and that body ordered the report and the schedule made a part thereof printed, and thus the ruling was sent broadcast over the state for a guide, both to shippers and carriers.

Thereafter and in 1881 the legislature passed a law re-

quiring railroad companies to furnish double decked cars for the shipment of sheep, and gave shippers the right to load both decks with sheep to the aggregate extent of 20,000 pounds and made it obligatory upon the carrier to transport the sheep as one car load. This act is in entire accord with the ruling of the commissioners, and not a disapproval of such ruling as counsel for respondent insists.

We think the construction given to the law by the commissioners as to what constitutes a car load is reasonable and just, and ought not to be disturbed.

On behalf of the respondents it is said the railroad commissioners have and had no power conferred upon them to declare what shall be the size or capacity of a freight car, or what shall constitute a car load. We do not say they have or had such powers. What we say is this, that they are executive officers charged with the special duty of enforcing this act of 1875, and the amendments thereto; that they have, in the proper discharge of their duties, held that ten tons constitutes a car load. That interpretation has been acted upon long enough to become a rule in their department, and should not be disturbed, unless plainly against the law, and we think it is not. We believe it to be a fair and just construction of the statute, just alike to the shipper and the carrier.

Other arguments are made in behalf of the respondents in opposition to the conclusion here reached, but we do not regard them as sufficient to change or modify what has been said. Accordingly the judgment is reversed. All concur.

Meaning of a "Car Load."—An Indiana case was an action for the breach of a contract to purchase a certain number of cars of ice. The court held, among other things, that the contract was not void for uncertainty, and that the quantity of a "car load" could be made certain by averment and proof. Schreiber *v.* Butler, 84 Ind. 576.

PITTSBURG, CINCINNATI & ST. LOUIS R. CO.

v.

STATE.

(Ohio Supreme Court, March 2, 1892.)

Taxation—"Fee" of One Dollar per Mile—Constitutional Law.—The Ohio Act of April 15, 1889, requiring "every corporation or company operating a railroad, or any part of a railroad, within this state" to pay to the commissioner of railroads and telegraphs a "fee" of one dollar per mile for

each mile of track operated by it within this state, contravenes sections 2 and 5 of article 12 of the Ohio constitution, which provide that "laws shall be passed taxing by a uniform rule all moneys, credits, investments * * * and also all real and personal property according to its true value in money," and that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

ERROR to Franklin Circuit Court.

On May 1, 1890, the state of Ohio, by its attorney general, in an action theretofore begun and then pending in the court of common pleas of Franklin county, filed the following amended petition: "The plaintiff says that the defendant is a corporation duly incorporated under the laws of the state of Ohio, having its principal office in the city of Columbus, in said state, and that on the 1st day of September, 1889, it operated two hundred and seventy-four and sixty-three hundredths (274.63) miles of railroad within the state of Ohio; that on the 16th day of October, 1889, said defendant filed its annual report, duly verified, for the year ending on the 30th day of June, 1889, in the office of the commissioner of railroads for this state; that it was the duty of the defendant to have filed said report on the 1st day of September, 1889, and to have paid on that day, to the commissioner of railroads, a fee of one dollar ($1.00) per mile for each mile of track operated by it within the state of Ohio, but that the defendant failed and refused, and still fails and refuses, to make said payment, or any part thereof, to the commissioner, or any one for him. Plaintiff says that by reason of the failure of the defendant to make said payment or any part thereof, there is due it from the defendant the sum of $274.63, for which it asks judgment, with interest from the 1st day of September, 1889. DAVID K. WATSON, Attorney General." To this amended petition a demurrer was interposed by the railway company which was overruled by the court; and, the railway company not desiring to plead further, a judgment was rendered against it, for the amount claimed, with interest, which judgment was affirmed by the circuit court in a proceeding brought in that court by the railway company to obtain its reversal, whereupon the present proceedings were begun in this court to reverse the judgment of both of said courts.

Watson, Burr & Livesay and *J. H. Collins*, for plaintiff in error.

David K. Watson, for the State.

BRADBURY, J.—The constitutionality of the act of the general assembly of the state of Ohio, passed April 15, 1889,

(86 Ohio Laws, 351,) is involved in the determination of the case. That act reads as follows: "Section 1. Be it enacted by the general assembly of the state of Ohio, that section 251 of the Revised Statutes be supplemented as follows: Sec. 251*a*. At the time of filing the report required by section two hundred and fifty-one, every corporation or company operating a railroad, or any part of a railroad, within this state, shall pay to the commissioner a fee of one dollar per mile for each mile of track, whether main, branch, double, or side track, operated by them within this state. Any corporation or company failing to pay such fee at the time prescribed shall forfeit and pay a sum of not less than one thousand and not more than five thousand dollars. All fees received by the commissioner under this section shall be paid by him into the state treasury upon an order from the auditor of state." Section 251, Rev. St., to which the section above quoted is supplementary, requires the president, etc., of any railroad situate in whole or in part within this state, to file in the office of the commissioner of railroads and telegraphs a report containing a minute and elaborate account of its business and transactions for the preceding year. The constitutionality of the section imposing a fee of one dollar per mile of track is assailed on two distinct grounds: (1) That it contravenes section 2, art. 12, of the constitution of this state, which provides that "laws shall be passed, taxing by a uniform rule all moneys, credits, investments, * * * and also all real and personal property according to its true value in money, * * *" (2) That it violates section 5 of the same article, (12,) which provides that; "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

Constitutional and statutory provisions.

If this exaction from railroad companies imposed according to trackage, is a tax, within the meaning of the constitution, then it falls within the inhibition of both of those sections of our constitution,—within the inhibition of section 2, because the railway property, including tracks, within the state is taxed by the general taxing laws of the state at its true value in money, and the tracks of a railroad, being part of its property, is subjected to a burden not imposed upon any other property within the state, and not imposed "according to its true value in money;" and within the inhibition of section 5, because it fails to state the object for which the tax is levied. The question of the constitutionality of the section,

The constitutional question.

therefore, must depend upon whether it shall be held to levy a tax or not, within the meaning of the constitution; and counsel direct their argument, in great measure, to the discussion of this point.

Counsel for the state contends at one stage of his argument that the exaction is not a tax, but, instead, partakes more of the nature of, and should be treated as, an assessment levied according to benefits which, it is claimed, accrue to the railroads operated within the state, by the provisions of the act creating the office and prescribing the duties of the commissioner of railroads and telegraphs. We are so accustomed to associate the doctrine of assessments levied upon property according to the benefits that may accrue to it with its usual subjects of application, some improvement of a local character, such as sidewalks, grading, and paving highways, and constructing and maintaining ditches, and the like, that the two are with difficulty separated in our mental operations; but, nevertheless, there may be no such necessary connection between them as to forbid a far wider extension of the principle, and its application to many other and perhaps widely varient subjects. But, however this may be, it is not necesssary to pursue the speculation further; for the sum exacted is an arbitrary one, having no apparent connection with any benefits conferred by the act itself or that to which it is supplementary, and the law fails to attempt in any manner whatever to provide a method by which any relation between the benefits and burdens that it confers or imposes can be ascertained, but simply provides for the payment of a fixed sum, which is to be applied solely to swell the general revenues of the state. None of the features heretofore present in all acts of the legislature which provide for assessments upon property according to the benefits it receives from the operation of law are discernible in the act under review, and it cannot be assigned a place in that class of legislation.

The statute held invalid.

The power of legislature to levy special exactions to be applied in payment of the expense of governmental supervision over certain lines of business, which the state, in the exercise of its police powers, may supervise, was maintained by this court in the case of Cincinnati Gas-Light & Coke Co. *v.* State, 18 Ohio St. 237. That case involved the constitutionality of an act of the general assembly of this state, passed April 6, 1866, (63 Ohio Laws, 164; Swan & S. St. 158,) providing for the inspection of gas-meters. The act provided for the appointment of an inspector, and prescribed his salary; provided also for the purchase of such apparatus as

might be required in the performance of the duties of his office, and for the purpose of paying the salary of the inspector and the cost of the necessary apparatus to enable him to perform his duties, provided that a sufficient sum therefor should be assessed against the several gas companies of the state according to their respective appraised valuation. In 18 Ohio St. 237, the power of the legislature to levy the exaction imposed upon gas companies by the act above mentioned was assailed upon the ground that it contravened the constitutional rule of equality in levying taxes, prescribed by section 2 of article 12 of the constitution. This court, however, sustained the act. The opinion of the court was delivered by Judge BRINKERHOFF; and, while it may be contended that some illustrations are found in the opinion of that learned judge not strictly apposite to the case, yet the opinion, taken as a whole, clearly shows that the decision was put upon the ground that the exactions levied upon the several gas companies were not a tax, within the constitutional meaning of that term. This view is supported by the following quotation from that opinion: "It is settled by the repeated decisions of this court in Hill *v.* Higdon, 5 Ohio St. 243; Reeves *v.* Treasurer, 8 Ohio St. 333; and Baker *v.* City of Cincinnati, 11 Ohio St. 534,—that the section of the constitution just referred to is only applicable to, and furnishes the governing principle for, all laws levying taxes for general revenue, whether for state, county, township or municipal corporation purposes. Now, although the assessment or charge upon the gas companies of the state imposed by the statute in question may be a tax, in the widest import of the word, it certainly is not a tax for purposes of general revenue. It is the assessment of a charge for a special purpose, growing out of the exercise of the supervisory power of the government over the business in which these companies are engaged." It is true that an examination of the act above mentioned, providing for the inspection of the gas meters, will disclose provisions highly beneficial to the gas companies; and it is contended that therein it differs from the act providing for a commissioner of railroads and telegraphs. The latter act, it is said, imposes burdens on the railroads of the state, instead of conferring benefits. An inspection of this latter act will disclose provisions, some of which are burdensome while others are beneficial; but whether the one or the other predominate, we do not think it material to inquire in this connection, for we apprehend that the question whether the act before mentioned, relating to the inspection of gas meters, etc., was upon the whole beneficial, rather than burdensome, to the gas companies of the

state, did not bear materially upon the decision of the court in 18 Ohio St. 237. The ground upon which that decision was put, we think, was that the business of manufacturing and selling gas was one that fell within the police or supervisory powers of the state, and that the expense necessarily attending upon its supervision could lawfully be charged against the gas companies, because the exaction made for that purpose was not a tax, within the constitutional meaning of that word. It cannot, we think, be denied that the business of transporting passengers and freight by the railroads within this state is clearly within the supervisory or police powers of the state as is that of making and vending gas; but, while this is so, it does not aid in upholding the statute now under consideration, for that statute does not attempt, as the gas-inspecting statute did, to provide a fund to be directly applied to liquidate the expenses attending the supervision.

What is this statute? Its constitutionality must be determined by its operation. It provides in terms that there be placed upon each mile of railroad track within this state an exaction of one dollar per annum. The statute calls it a "fee," but its nature is not affected by the name that may be assigned to it. It is an exaction levied upon railroad tracks, and railroad tracks are property. It does not differ in principle from a fixed sum levied upon all the farmers of the state for each acre of land of which they may be seized, or each head of horses or other live-stock that they may own. In both instances the tax is levied upon property, but it is neither levied "according to its true value in money" nor uniformly upon all property, both of which are constitutional requirements, (section 2, art. 12,) if it is a tax within the constitutional meaning of that word. That it is such a tax, we think there can be little, if any, doubt. A tax is "a pecuniary burden imposed for the support of the government. * * * Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes." 2 Bouv. Law Dict. 705. The money raised by this section under consideration is directed to be paid into the state treasury. It becomes a part of the funds of the state, applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the act to which it is supplementary, to indicate a purpose that the fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish being to create a fund by an exaction on property to be paid into the state treasury, to be used indis-

criminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue.

Judgment of the circuit and court of common pleas reversed, and petition dismissed.

GULF, COLORADO & SANTA FE R. CO.

v.

ELLIS.

(*Texas Supreme Court, February 2, 1892*).

Killing Stock—Statute Allowing Attorney's Fee—Constitutional Law.—A statute allowing the plaintiff, in an action against a railroad company to recover damages for the killing of stock, to recover an attorney's fee of ten dollars, does not contravene a constitutional provision prohibiting special laws providing for or changing the method of collecting debts—or in all cases where a general law could be made applicable, nor a provision that no one shall be deprived of life, liberty, property, privileges, or immunities, without due process of law; nor is such a statute so discriminatory and opposed to the principles of republican government, that it cannot be presumed that the legislature had power to pass it.

COMMISSIONERS' decision. Section A. Appeal from Lampasas District Court.

Action to recover for stock killed. Judgment for plaintiff. Defendant appeals.

J. W. Terry, for appellant.

HOBBY, P. J.—W. H. Ellis, by next friend, H. W. Ellis brought this suit in the justice court of Precinct No. 1, in Lampasas county, against the appellant, on account for $50, the value of a certain colt killed by appellant's engine and cars on August 12, 1890. It was alleged by appellee that this claim, verified by affidavit, had been presented to appellant's stationmaster nearest the place where the colt was killed, according to the requirement of the Act of April 5, 1889, and that the amount was not paid at the expiration of thirty days after such presentation, wherefore $10 attorney's fees, provided by said Act

Case stated.

upon the happening of the contingency, was claimed. Appellee's answer admitted the correctness of the claim for stock killed, but denied its liability for the attorney's fees. Judgment was rendered for the amount claimed. On appeal to the district court, judgment was rendered for the same amount. This appeal is from that judgment.

The only question in this case involves the validity of an Act of the legislature approved April 5, 1889, entitled "An Act to regulate the presentation and collection of personal services, or labor, or for damages, or for overcharge on freight against railway corporations doing business in this state, in cases where the amount claimed does not exceed $50, and to fix the measure of damages recoverable in certain of such cases. Section 1. Be it enacted by the legislature of the state of Texas that, after the time when this Act shall take effect, any person in this state having a valid *bona fide* claim for personal services rendered, or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation, operating a railroad in this state, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation, by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim, and all costs of suit; and, in addition thereto, all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."

Statutory provisions.

The validity of this law is assailed on the ground that it is in violation of section 50, art. 3, of the constitution of Texas, which prohibits the legislature from passing any special law providing for or changing the methods for the collection of debts or the enforcing of judgments. It is also in violation of the general clause of

Constitutional objections to statute.

such section, which prohibits the legislature from passing a special law in all cases where a general law could be made applicable. And it is also violative of the nineteenth section of the bill of rights, which provides that "no citizen of this state shall be deprived of life, liberty, or property, privileges, or immunities, or in any manner disfranchised, except by due course of the law of the land."

Statute not unconstitutional.

It has been adverted to, as a remarkable fact, by one of the judges of the supreme court of the United States, that, although this restrictive provision in the federal constitution, upon the general government, has existed for more than a century in that instrument, it has been rarely invoked in its application to that government. While, on the other hand, it has only constituted a part of the constitution for a few years in its restraint upon the power of the states, the cases have been numerous in the federal courts where those tribunals have been urged to declare that state legislatures have deprived their citizens of property, etc., without due process of law. Abundant evidence, it is said, exists, indicating that there is a strange misconception of the scope of this provision in the fourteenth amendment. Davidson *v.* New Orleans, 96 U. S. 97 *et seq.*; 6 Myers, Fed. Dec. §§ 701, 702. After volumes written and spoken on this subject with a view to the exposition of these phrases, no general definition of them has been found which will cover every case. "When the law of a state imposes any charge or burden upon property for the public use, whether for the whole state, or a limited portion thereof, and the laws provide a mode of conforming or contesting such charge, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however objectionable it may be otherwise." *Id.* The full significance of these phrases is said to be that statutes which would deprive a citizen of the rights of person or property, without a regular trial according to the course and usage of the common law, would not be the law of the land. They were intended to protect the individual against the "arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice." "'Due process of law' undoubtedly means in the due course of proceedings, according to those rules and forms established for the protection of private rights." "Such an exercise, in each particular case, of the powers of the gov-

ernment, as the settled maxims of law permit and sanction, and under such safeguards, for the protection of individual rights, as those maxims prescribe for the class of cases to which the one in question belongs."

None of these principles (which have become so familiar, and are so deeply impressed on the legal mind, that the citation of authorities in their support is unnecessary) can it be said, we think, are violated by the statute under consideration. It makes ample provision for a trial and adjudication, upon the merits of the claim, for stock killed, in accordance with the forms and established usages for the protection of private rights, and prescribes a safeguard in the requirement that an attorney shall be in fact employed before the costs therefor shall be taxed, not found in other cases. This act "hears before it concludes, proceeds upon inquiry, and renders judgment only after trial." Since the Dartmouth College Case, 4 Wheat. (U. S.) 518, these have been the recognized tests for determining whether property or rights have been taken without due process of law, or in accordance with "the law of the land."

There is nothing in the "able and interesting opinion" in Taylor *v.* Porter, 2 Hill. (N. Y.) 140, to which we may not assent without conflicting with the views entertained by us on the question now before us. In that case the power of the legislature of the state of New York to authorize a private road to be laid out over the lands of a person, without his consent, was held to be unconstitutional. Private property, it was said, could not be taken for public use without just compensation therefor. And the power of the legislature to transfer or take the property of one person, for the use or benefit of another, was repudiated, as it could not be taken without due process of law. The want of analogy between that case and the present is too obvious to require discussion.

Nor do we believe that the objection that the act is a special law, and obnoxious, because it is applied to a class of citizens only, is well founded. To make a statute a public law of general application, it is not essential that it should extend even to all parts of the state. It has been held sufficient if it applies to all persons within the limits defined by the act. Cooley, Const. Lim. p. 488, note 2. Laws may be extended to all citizens, or be confined to particular classes, as, for example, bankers, miners, traders, and the like. "The power that legislates for the state, it is said, must determine whether its rules shall extend to all of its citizens, or a class of them only." Cooley, Const. Lim. p. 488. "The business of common carriers is referred to as requir-

ing special statutory regulations for the general benefit. * * * If otherwise unobjectionable, these laws are only required to be general in their application to them." *Id.* Of the policy and propriety of such laws, the legislative department alone must determine. It has been held that a statute is general and uniform in its operation when it affects equally all brought within the relations and circumstances provided for, although it may not operate on every citizen. 3 Am. & Eng. Enc. Law, p. 697. We are of the opinion that the act in question does not belong to that class of special laws the legislature is prohibited from the passage of by the constitution of our state.

If, however, these views are correct, we are confronted with appellant's proposition to the effect that, if the act is not prohibited by any special constitutional mandate, "it is so discriminatory in its character, being directed against one class of citizens only, and is so opposed to the principles of republican government, that it can not be presumed that the people intended to have conferred the power on the legislature to pass it."

Discriminatory character of statute.

The ablest and most conservative writers on constitutional law seem to entertain grave doubts as to the wisdom and propriety of the judicial department venturing upon the dangerous ground of declaring a statute void because it is unjust or oppressive, or is supposed to affect the natural rights of the citizen, because it is violative of the fundamental principles of republican government, unless it appears that these principles are placed beyond legislative control by the terms of the constitution. This is founded on the reason that these principles are so susceptible to the varying demand, growing out of public necessity and expediency, that they cannot always be incorporated in the constitution; and it is only generally, where they have found expressions in that instrument, that the "principles of republican government" constitute a guide for our action, or restraint on legislative power.

Numerous illustrations are given by Judge COOLEY of the legislative disregard and invasion, in a restricted sense, of what may be termed, in the abstract, "republican principles," among which he cites the imposition of taxation without representation, the interference by police regulations in local affairs, etc. Cooley, Tax'n, pp. 205, 206. We are not able to see that the principles invoked with ability in appellant's brief are violated by the act under consideration, nor do we think the cases discussed so fully by him are decisive of the question before us.

The question before the court in the case of Durkee *v.* City of Janesville, 28 Wis. 464, a case relied on by appellant, was whether a law of that state which provided that no costs should be recovered against the city of Janesville in any action commenced by the city to set aside any tax assessment or deed, or to prevent the collection of taxes, etc., in said city was constitutional. This act was there held to be void, because it was not within the proper scope of the legislative power to exempt by name corporations from the operation of general laws, providing that the prevailing party should recover his costs. The difference between the question in that case and that before us is too obvious to require anything further than the statement of the questions, respectively.

It has been held in this state that it is the statutory duty of a railroad to fence its track in those places where it can be properly done. International & G. N. R. Co. *v.* Cocke, 64 Tex. 151, 23 Am. & Eng. R. Cas. 226; Missouri Pac. R. *v.* Dunham, 68 Tex. 231, 31 Am. & Eng. R. Cas. 530. Such being the construction of our statute, (article 4245,) this duty may be enforced by the penalty prescribed in the act assailed in this case, providing for the assessment of reasonable attorney's fees against the company, if the claim for the stock killed be established as therein provided, by judgment. A similar statute was held to be valid on this ground in the state of Illinois. Peoria, D. & E. R. Co. *v.* Duggan, 109 Ill. 538, 20 Am. & Eng. R. Cas. 489. There is nothing to show that the stock killed on which the claim in this case is founded, was not killed on the railroad at a point where it was not fenced.

In addition to the views we have expressed, we believe it to be entirely within the power of the legislature to fix the measure of damages in certain cases, which it appears from the caption of the act was the purpose of the statute. This power has been heretofore exercised. Such damages are authorized as a compensation for injuries sustained by reason of "delay of rights," as was the case under article 1580, Pasch. Dig., where the supreme court was authorized to assess, in cases of appeal, 10 per cent. damages for delay. So, too, in cases of the trial of the right of property, on the failure of the claimant to establish his right, similar damages were allowed to be assessed on the value of the property. Rev. St. arts. 4840, 4843. These articles, in so far as the power of the legislature is involved, are similar to the act in this case. But the power to regulate thus the measure of damages in those cases has not been denied by the courts.

Our opinion is that the act is not subject to the objections

urged, under the assignments of error presented by appellant, and we think the judgment should be affirmed.

PER CURIAM. Affirmed, as per opinion of commission of appeals.

Statutes Allowing Recovery of Attorney's Fee in Actions Against Railroad Companies.—There is considerable conflict among the decided cases as to whether a statute allowing the plaintiff in an action to enforce a statutory liability of a railroad company to recover a certain amount as an attorney's fee, is constitutional. Most of these statutes confine such a recovery to actions to recover damages for the killing of live stock. In such cases the allowance of an attorney's fee is in the nature of a penalty for failure of the company to fence its track, and, according to the weight of authority, it is not unconstitutional. Thus, in *Illinois* it has been held 'that the statute making railroad companies liable for attorney's fees in actions for killing stock, is not objectionable as special legislation. The statute was upheld as being in the nature of a penalty for non-compliance with the duty of fencing, and as a police regulation for the protection of animals, and for the public welfare. Peoria, D. & F. R. Co. *v.* Duggan, 109 Ill. 537, 20 Am. & Eng. R. Cas. 489. And in *Minnesota*, a statute which provided an extra allowance of ten dollars in justice's courts, and double costs in the district court in case of recovery in actions against railroads for killing stock, was held not to be unconstitutional, but a legitimate exercise of legislative discretion. There was said to be no force in the objection that such legislation is unequal or partial, for the reason that it is applicable to all railroad corporations in the state, and to all plaintiffs claiming damages for cattle killed through their negligence. Johnson *v.* Chicago, M. & St. Paul R. Co. 29 Minn. 425. In *Kansas* the supreme court held that a statute giving a "reasonable attorney fee" to the plaintiff, in case of a recovery for the prosecution of his suit against a railroad company for the value of stock killed or injured, is constitutional. Although such a provision may seem harsh or rigorous, it is in the nature of a penalty and is not beyond the power of a legislature. Kansas Pacific R. Co. *v.* Mower, 16 Kan. 573. Atchison & N. R. Co. *v.* Harper, 19 Kan. 529. In *Missouri* a statute giving an attorney's fee, as costs in favor of the plaintiff in suits for an injury to stock resulting from the failure of a railroad company to fence its track, has been upheld as a valid exercise of the police power of the state, and held not to be in conflict with the constitutional provision prohibiting special laws granting exclusive privileges. Perkins *v.* St. Louis, I. M. & S. R. Co., 103 Mo. 52. The provision in the *Iowa* "joint through rate" act that when a recovery is had for its violation attorney's fees are to be adjudged against the defendant, does not render such act void either as granting an exclusive privilege to certain suitors or as the imposition of a penalty upon the right defense. Burlington, C. R. & N. R. Co. *v.* Dey, (Iowa), 45 Am. & Eng. R. Cas. 391.

A statute allowing an attorney's fee in stock killing cases seems to be as much a police regulation as is a statute allowing the recovery of double damages in such cases. Perkins *v.* St. Louis, I. M. & S. R. Co., 103 Mo. 52. And it has been held by the United States supreme court that these double damage acts, which are in force in many of the states, are constitutional and valid. Missouri Pacific R. Co. *v.* Humes, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557.

In *Arkansas* it has been held that under a statute providing that for an over-charge by a railroad company, it shall forfeit and pay not less than fifty nor more than three hundred dollars and costs, including a reason-

able attorney's fee, the attorney's fee is a part of the penalty for the violation of the provisions of the act, and stands upon the same footing as the money judgment to be recovered; and including it as a part of the penalty is not making the act objectionable as being partial or unequal legislation. Dow *v.* Beidelman, 49 Ark. 455, 31 Am. & Eng. R. Cas. 14. But in the same state a statute providing that where stock is killed or injured by railroads, the damages shall be assessed by arbitration, and if either party refuses to abide by the award and takes the case before the courts, and shall not recover a more favorable judgment than the award, such party shall be assessed a reasonable attorney's fee for the opposing litigant, is unconstitutional. St. Louis, I. M. & S. R. Co. *v.* Williams, 49 Ark. 492, 31 Am. & Eng. R. Cas. 555.

In *Michigan* a statute, which authorizes the taxing of an attorney's fee against a railroad company in addition to the costs in the event of a judgment being recovered against it for killing or injuring stock through its failure to fence its road, was held to be in the nature of a penalty imposed upon a class and therefore open to the objection that it was partial legislation. The supreme court held that such an act was unconstitutional and void. Wilder *v.* Chicago & W. M. R. Co., 70 Mich. 382, 35 Am. & Eng. R. Cas. 162; Lafferty *v.* Chicago & W. M. R. Co., 71 Mich. 35; Schut *v.* Chicago & W. M. R. Co., 70 Mich. 433, Rinear *v.* Grand Rapids & I. R. Co., 70 Mich. 620. And the *Mississippi* act of 1882, giving an attorney's fee to an individual in appeals in actions to which a corporation is a party, has been held unconstitutional because violative of constitutional provisions as to equality before the laws. Chicago, St. Louis & N. O. R. Co. *v.* Moss, 60 Miss. 641, 20 Am. & Eng. R. Cas 555. So, in *Alabama*, it has been held that a statute which requires a reasonable attorney's fee, not exceeding twenty dollars, to be assessed by the court as a part of the costs against every unsuccessful appellant in suits against railroads for killing stock under said statute, is unconstitutional and void, as violating the equality of rights secured by the state and federal constitution. South & North Alabama R. Co. *v.* Morris, 65 Ala. 193.

In Kansas, where the findings show that an animal was injured on a railroad track through the failure of the company to fence, and the negligence of the company in running and operating the train, attorney's fees are recoverable under the statute of 1874. Central Branch Union Pacific R. Co. *v.* Nichols, 24 Kan. 242. Missouri Pac. R. Co. *v.* Abney, 30 Kan. 41. To recover an attorney's fee, under the railroad stock law of Kansas, it is not essential that the plaintiff should state in his pleading that the employment of an attorney in the case was necessary. The full statement of the facts concerning the injury and the prayer for an attorney's fee will sustain a recovery. Kansas City, F. S. & G. R. Co. *v.* Burge, 40 Kan. 734, 40 Am. & Eng. R. Cas. 181. Under the Kansas statute, the attorney fee allowed is for the prosecution of a suit and covers the entire prosecution, from the commencement until the final termination in the district court. Missouri River F. S. & G. R. Co. *v.* Shirley, 20 Kan. 660.

Under the Illinois statute the liability of the railroad company for attorney's fees in an action to recover for an injury to animals arises at the same instant with its liability for damages, and such fee may be assessed in the same suit with the damages, the law not favoring a multiplicity of actions. Peoria, D. & E. R. Co. *v.* Duggan, 109 Ill. 537, 20 Am. & Eng. R. Cas. 489. Where the law makes provision for the recovery of an attorney's fee for the prosecution of a suit for damages for killing stock, there is less reason for favoring insufficient and defective complaints in those actions than in the ordinary cases commenced in justice's courts. St. Louis & S. F. R. Co. *v.* Byron, 24 Kan. 350. In such cases the de-

fendant may insist upon legal accuracy in the plaintiff's pleadings and proceedings, even before a justice of the peace; and where the bills of particulars alleges that "twenty-five dollars is a reasonable fee for the prosecution of this action," and contains no other allegations as to the value or necessity of attorney fees, no judgment should, in the absence of defendant, be entered for a larger amount, although on appeal and in the district court; and this, notwithstanding the bill prays for twenty-five dollars attorney fee in a justice's court, and "twenty dollars as a reasonable fee for trial thereof in the district court." St. Louis & S. F. R. Co. *v.* Armstrong, 25 Kan. 561.

In an action against a railway company in a justice's court under chap. 94 of the Kansas laws of 1874, for killing plaintiff's cow, where plaintiff does not allege in his bill of particulars that the company's road was not fenced, and says nothing about attorney-fees except in the prayer for judgment, and the only prayer for judgment is "for said sum of thirty dollars, together with costs of suit, and a reasonable attorney-fee for the prosecution of this suit," and the case is tried both in the justice's court and in the district court upon this bill of particulars without any objection being made as to its sufficiency, and the district court finds specially, among other things, that the road was not fenced, that the cow was worth thirty dollars, that a reasonable attorney-fee for prosecuting the suit in the justice's court was ten dollars, and in the district court twenty-five dollars, for which sums judgment is rendered against the defendant, with costs, and the defendant then brings the case to the supreme court, and assigns for error merely that "the decision of said judge was contrary to law," and the question of the sufficiency of the plaintiff's bill for particulars is raised for the first time in the supreme court, and then by brief only; *held*, that the judgment of the district court will not be disturbed merely because of any supposed insufficiency in the plaintiff's bill of particulars, nor will it be disturbed because of any supposed insufficiency in the findings of the court below with respect to attorney-fee. Kansas Pacific R. Co. *v.* Yanz. 16 Kan. 583.

In an action for killing stock, where the action was commenced before a justice of the peace, and the bill of particulars set forth all the facts of the plaintiff's case, without mentioning, however, any attorney's fee, and then prayed for a judgment against the defendant railway company for the value of the heifer and costs of suit, "and that such attorney-fee be taxed against the defendant as this court may think reasonable," and the parties afterwards, in the district court, in an agreed statement of the facts of the case, agreed "that if the defendant is liable to pay an attorney fee in this case, under the the foregoing facts, the sum of twenty dollars would be a reasonable fee for the plaintiff's attorney for prosecuting said action;" and the case was submitted to the trial court upon the pleadings and the agreed statement of facts, and no question was at any time raised with reference to the sufficiency or insufficiency of the bill of particulars with regard to the plaintiff's claim for an attorney-fee; and the court below, after deciding that the railway company was liable for the value of the heifer and costs, held that the defendant was also liable to pay plaintiff an attorney-fee of twenty dollars, and rendered judgment accordingly: *Held*, that the trial court did not err with respect to the attorney-fee. Missouri Pacific R. Co, *v.* Abney, 30 Kan. 41.

M. commenced an action in a justice's court against a railroad company, under the "act relating to killing or wounding stock by railroads," and set forth in his bill of particulars a good cause of action for thirty-five dollars damages for killing his cow, and then alleged "that ten dollars, is a reasonable attorney-fee for the prosecution of this suit," and "prayed for judgment against the said defendant for the said sum of thirty-five dollars,

his damages sustained as aforesaid, and ten dollars attorney-fee for the prosecution of this suit, and costs." In the district court, to which the case was afterward taken on appeal, the jury found from the evidence for the plaintiff, and assessed his damages at "thirty-five dollars, and ten dollars attorney-fee," and judgment was rendered accordingly, and it appears from the record that the plaintiff was assisted by an attorney. *Held*, that the judgment for the attorney-fee will not be reversed where no reason for such reversal can be given except that the said bill of particulars does not state facts sufficient to authorize such a judgment. St. Louis, Lawrence & Western R. Co. *v.* Miller, 18 Kan. 212.

MEEKER

v.

NORTHERN PACIFIC R. CO.

(*Oregon Supreme Court, January 11, 1892.*)

Killing Stock—Construction of Statute—Cause of Injury—Absence of Actual Collision.—Under a statute (Hill's Code Or. § 4044) making railroad companies liable for killing or injuring stock "upon or near any unfenced track * * * whenever such killing or injury is caused by any moving train or engine or cars upon such track," it is not essential to a recovery that the killing or injuring be caused by an actual contact of the moving cars or engine with the animal. If the want of a fence permits an animal to get on a track, where it is frightened by an approaching train and flees down the track to escape the danger, and in that flight runs into an open trestle and is injured, the railroad company is liable under such statute.

APPEAL from Columbia Circuit Court.

Dolph, Bellanger, Mallory & Simon, for appellant.

McBride & Dresser, for respondent.

LORD, J.—This was an action brought under § 4044, Hill's Code, to recover damages for the alleged value of a mare, which had entered upon the railroad track of the defendant company, where the same was unfenced, and while there was driven by a moving train into an open trestle, and so crippled and injured as to be rendered valueless. The facts tended to show that there were some three or four horses, including the mare, running at large upon a range that entered upon the unfenced track of the defendant's railroad; that not far behind where the horses entered upon the track was an engine and a train coming along, and that as soon as the engineer discovered them he sounded the alarm whistle of the engine, as is usually given when stock is on the track; and that the horses becoming frightened at the approaching train, or the

Case stated.

sound of the whistle, or both combined, commenced running along the track, followed by the engine and train, until they reached an open trestle on the track, where the mare fell and broke her foreleg just below the knee-joint, while the others passed over without injury; that neither the engine nor any part of the train came in actual contact or collision with any of the horses or mare, but was stopped more than 100 feet before reaching the trestle where the mare fell; that the track along which the horses were running was graded part of the way on the side of a hill, the banks on both sides being steep, and there being not to exceed two places where they could leave the track, without great difficulty or danger, from the place of their entry upon the track to the trestle or place where the mare was injured.

Substantially upon this state of facts the counsel for the defendant moved for a nonsuit, upon the ground that the evidence for the plaintiff disclosed no liability, in that the animal was not "touched by any train, car, or engine of the defendant," and that the company is "not liable for frightening the animal." Upon the motion being overruled, the defendant excepted, and the error assigned in this regard constitutes the important question to be determined.

Question presented.

That question involves the proper construction of § 4044, Hill's Code, which provides, that "any person * * * or corporation, owning or operating any railroad, shall be liable for the value of any horses," etc., "killed, and for reasonable damages for any injury to any such live-stock upon or near any unfenced track of any railroad in this state, whenever such killing or injury is caused by any moving train or engine or cars upon such track." The contention for the defendant is that the "killing" or "injury" mentioned in the section has reference to only such as results from or is caused by actual contact of the moving train or engine or cars with the animal killed or injured. If it was intended by the statute that the "killing or injury" must have been caused by actual collision, that is, the stock must have been killed or injured by actual contact or collision with a "moving train or engine," upon such track, then the defendant is not liable, and the plaintiff cannot recover upon the evidence; for, while it is clear that the railroad was not fenced, where the duty to fence existed, by reason of which the horses got upon the track, it is equally clear that none of them were struck by the engine, and thereby killed or injured; but that while thus on the track the mare, and the other horses, becoming frightened, either at the noise of the approaching train, or the repeating sound-

ing of the stock-alarm whistle, or both combined, fled down the track followed by the engine and cars, and ran into the open trestle, and was permanently injured, without any actual collision with the engine or cars of the train, or any negligence (as we shall assume) or willful misconduct of the agents in charge of it. Under such circumstances, the defendant claims that the statute does not contemplate any liability; that damages resulting from fright to animals, and not from actual collision, where there is no imputation of negligence or wilful misconduct on the part of the agents of the corporation are consequential, and not within the purview of the statute.

Necessity for actual collision—Authorities reviewed.

In support of this construction of the statute, namely, that the death or injury of the animal must be caused by actual collision with the engine or cars of the train, we are referred to Peru & I. R. Co. *v.* Hasket, 10 Ind. 409, and Ohio & M. R. Co. *v.* Cole, 41 Ind. 331. In the first case, at the sound of the whistle of the approaching train, the mare ran on the track before the train until she came to a culvert, and then jumped so as to clear the culvert, and fell on the side of the track and broke her left leg, but she was not touched by the engine or any of the cars of the train. Upon this state of facts, the court held that the statute contemplated a direct injury; that the language, "shall be killed or injured by the cars or locomotive, or other carriage," etc., involved the idea of actual collision; and that it would not be consistent with the intent of the act to give the language such an exposition as would cover a case of consequential damages. The court says: "No doubt the train caused the animal to take fright, and the injury was the result of such fright. But suppose the mare, at the sound of the whistle, instead of running upon the road, had run from the road, and while thus running had received an injury, would the company be liable? It seems to us it would not. The principle of the case hypothetically stated would be alike applicable to the case at bar."

In the other case a colt was frightened by a train, and ran from an adjoining field upon the railroad track, which was not properly fenced, and broke its leg between the bars of a cow-pit; and as the facts showed that the colt was not injured by the locomotive or cars, or touched by them, it was held that the company was not liable under the statute.

In Lafferty *v.* Hannibal & St. J. R. Co., 44 Mo. 291, the horses got on the track of the railroad where it was not fenced, and while on the track they were frightened by the train, and in running, hurt themselves while jumping off the

track; but there was no collision, nor were the animals injured by any actual contact. The words of the statute are that the company shall be "liable in double the amount of all damages which shall be done by its agents, engines or cars, to horses, cattle, mules, or other animals on said road." Although the phraseology of the statute differed somewhat from the Indiana statute on the subject, the court thought, in substance and effect, it was identically the same, and held that it contemplated a direct or actual collision between the train and the animal injured.

In Schertz *v.* Indianapolis, B. & W. R. Co., 107 Ill. 577, 15 Am. & Eng. R. Cas. 523, the language of the statute of Illinois is identical with the statute of Missouri on the same subject; that is, in case of a failure to comply with the provisions of the statute, the railroad corporations should be liable for all damages that might be done by its "agents, engines, or cars." In this case there was no collision, and the horse was not injured by any actual contact, but, becoming frightened at the approaching train, ran down the track, and in its flight was injured by jumping a cattle-guard, without any negligence or willful misconduct on the part of the servants of the corporation. Upon these facts the court thought the statute admitted of the same construction as was given to the Missouri statute, and held that, where the stock is not killed or injured by any actual collision, there is no liability on the railroad corporation, saying: "Consequential damages resulting from fright to animals, not caused by any negligence or willful misconduct of the agents of the corporation, are not embraced within the statute."

See, also, Louisville, N. A. & C. R. Co. *v.* Smith, 58 Ind. 575; Baltimore, P. & C. R. Co. *v.* Thomas, 60 Ind. 107; Croy *v.* Louisville, N. A. & C. R. Co., 97 Ind. 126, 19 Am. & Eng. R. Cas. 608; Knight *v.* New York, L. E. & W. R. Co., 99 N. Y. 25, 23 Am. & Eng. R. Cas. 188; Holder *v.* Chicago, St. L. & N. O. R. Co., 11 Lea. (Tenn.) 176, 13 Am. & Eng. R. Cas. 567; Seibert *v.* Missouri, K. & T. R. Co., 72 Mo. 565, 6 Am. & Eng. R. Cas. 584. Under statutes of this character, it is essential to the liability of a railroad company for the death or injury of an animal that it should be actually touched by the engine or cars of the train.

The decisions turn upon the language of the enactment which import the idea of actual collision or contact with the animal injured or killed. In such cases, whenever the owner of stock founds his claim for damages upon statutes of this sort, he is required to bring his case substantially within its terms by alleging and proving that the stock was "killed or injured by the locomotive," etc., or the damage was done by

an "engine" or "agent," according to its provisions. Hence under statutes of this kind, railroad companies are not liable for frightening stock by their engine or cars, even though the fright causes the animals to kill themselves. They exclude by their language any injury not occurring from actual collision with the locomotives or cars.

Under Oregon statute no actual collision is necessary.

But the inquiry is raised whether the language of the statute is not broad enough in its terms to include, not only injuries which are caused by direct collision, but such as might result from a moving train to any live stock upon or near its unfenced track. Our statute says, in brief, that a railroad company shall be liable for any stock killed or injured upon or near any unfenced track, whenever such killing or injury is caused by a moving train upon such track. In construing this statute, it must be constantly borne in mind that there must be a want of a fence along the railroad track, which would have prevented the injury; and that where the want of a fence sustains no relation to or connection with the injury, when caused by a moving train, the statute has no application. Hence the case suggested intended to illustrate that, if any construction is given to the statute for the death or injury of stock other than occurs by actual collision, it might be contended, "if a horse running in the pasture of his owner, through which the railroad passes, and is unfenced, should take fright at a passing train, run half a mile across the field in an opposite direction to the railroad, then run into a pit dug by the owner, or against a fence built by him, or against a tree which nature put there, broke his neck, and died, the railroad company would be liable for the value of the horse, because the track of its railroad was unfenced," is not well taken. In such case, or cases of that sort, the want of a fence sustains no relation to or connection with the injury, and the statute has no application.

When a statute imposes liability for the killing or injury of stock, caused by a moving train, upon or near its unfenced track, it includes all such causes as are produced by a moving train that directly contribute to that result, whether caused by actual collision or not, when the injury occurs upon or near its unfenced track. The words, "whenever such killing or injury is caused by a moving train," etc., relate to injuries directly caused by it to stock upon or near its unfenced track, and are broad enough to include all injuries, thus occurring, which are the direct result of such moving train, upon such track. This would include injuries occurring upon its track from other causes than actual collision. The "killing or injury" must be caused by a moving train,

but it is immaterial, whether such "killing or injury" is the result of actual collision or not, so that it is caused, for the want of a fence, by a moving train upon or near its track. It is enough if the injury which results is caused by a moving train, when the lack of a fence permitted the animal to get on the track. This construction is further sustained by the use of the words, "near any unfenced track," which indicate a place where the death or injury to the animal may happen without actual contact with the engine, yet be caused by it. Hence a moving train may be the cause of the injury or death of an animal without actual collision. To illustrate: For the want of a fence along the track of a railroad where it ought to be fenced, an animal enters upon the track, and while there takes fright at an approaching or moving train, and to escape the danger, runs along the track and falls into a trestle, or jumps into a ditch, near the track, and is injured. Is not the injury caused by a moving train? It caused the animal to take fright, and in its flight to run into the trestle or jump into the ditch and injure itself. From the cause of the fright to the injury there is no break nor intervening agency. The moving train was the cause of the injury, and without it the injury would not have occurred. Under our statute, then, it is sufficient if the moving train caused the injury, in connection with an omission to fence, whether there was actual collision or not.

Under statutes of other states, when the language of the enactment did not necessarily import that there must be actual collision to give a right of recovery, their courts have held that it is not necessary that there shall be a collision to entitle the owner of the injured animal to recover. **Further review of cases.**

In Young *v.* Louisville K. C. & N. R. Co., 44 Iowa, 173, a horse went upon defendant's track, which was not fenced, before a train, and ran ahead of the train until it fell into a bridge, and received injuries from which it died. There was but a single narrow passage down the fill of the road affording an avenue of escape between the point where the horse went upon the track and the bridge: the train was stopped before it reached the horse. The statute of Iowa imposes upon railroad companies liability for stock injured upon their roads when unfenced at points where the duty to fence exists, when the injury results by reason of a want of a fence, and is not occasioned by the willful act of the owner. Under this statute, and upon the facts as stated, the railroad company was held liable. The court said: "When then, may it be said that an animal is injured by a want of a fence within the meaning of the statute?" The answer was

"It is when the want of a fence in connection with the facts of the defendant, is the proximate cause of the injury."

In Kraus *v.* Burlington, C. R. & N. R. Co., 55 Iowa, 338, the mare got on the track by reason of a want of a fence, and, being frightened by a train, ran along the track in front of it until she came to a bridge forming a part of the road, in attempting to cross which she was greatly injured, without having been struck by the train, and the court held that it was not necessary that the mare should have been struck by the train to authorize a recovery under the statute. In this case the defendant asked the court to instruct the jury that, "If the railroad run through a plat of country from the point where the mare in question came upon the track, and could have escaped from the track just as well as not, but instead of doing so she ran along upon the track, jumped into the bridge, and was injured without collision with the railroad train or locomotive drawn by it, then there can be no recovery in this action." The court says: "We are not prepared to say the defendant can escape a result caused by its negligence in failing to fence, by setting up a want of intelligence, or the negligence of the animal injured; nor are we prepared to say as a matter of law, that the plaintiff cannot recover if the facts were as stated in the instruction refused."

In Liston *v.* Central Iowa R. Co., 70 Iowa, 714, 26 Am. & Eng. R. Cas. 593, it was claimed that the horse was not killed by reason of the absence of the fence at the place of accident, because there was nothing to prevent him from leaving the track; but the court held although a horse may be "crazy," if he gets upon the track of a railroad on account of a want of a fence where the duty to fence exists, and, for want of intelligence runs ahead of the engine on the track, when he might escape on either side, and runs in a bridge and is killed, without being struck by the engine, the company is liable, notwithstanding the horse's want of intelligence, and the manner of his death.

In Atchison, T. & S. F. R. Co. *v.* Jones, 20 Kan. 529, a mare got on the track at a place where it ought to have been but was not fenced, and, being frightened at an approaching train, fled along the track until she reached a tie bridge, when she either jumped forward or was thrown forward by the engine, onto the bridge, and was fatally injured. The statute of Kansas imposes liability for every animal killed or wounded "by the engine or cars on such railway, or in any other manner whatever in operating such railway," etc., where there is an omission to fence. The court held that under the statute no actual collision between the engine and

the animal injured is essential to liability. BREWER, J., speaking for the court, said: "This last clause is very broad, and clearly covers a case like the present. Whether the engine struck the mare or not, the injury resulted directly from the operating of the railway. Of course, the mere fact that she was injured on the track would not be conclusive. * * * But where the injury occurs in the actual operating of the railway, and as the direct result of such operating, then the statute applies. Here the company was running one of its trains. An animal is on the track, permitted to come on through the lack of a fence along the track at a place where it ought to be fenced. The approaching train frightens it, and it flees along the track to avoid danger, and in that flight either falls or is thrown by the engine into the open space of a tie bridge and is injured. Clearly, the train, acting upon the animal's sense of fear, and the open space of the bridge, are the direct causes of the injury. It results from and occurs in operating the road."

In all these cases the fact that the train did not strike the animal does not relieve the railroad company from liability. But in all of them the fence bears a relation to the injury, in connection with the operation of the train as the proximate cause.

Sections 4044, *supra*, and 4048, when taken together, provide, in effect, that a railroad company shall be liable for the value of stock killed, and for reasonable damages when injured, upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track and (4048) that in every action for the recovery of such value for stock so killed, or for damages for such injury to the same, the proof of the killing or injury shall, of itself, be deemed and held conclusive evidence of negligence on the part of the company; but contributory negligence on the part of the plaintiff in such action may be set up as a defense. "The statute," says THAYER, C. J., "makes the killing or injury of stock in such case conclusive evidence of negligence upon the part of the railroad company, and I do not see that it is necessary for the plaintiff to allege negligence in any form." Hindman *v.* Oregon R. & Nav. Co., 17 Or. 620, 38 Am. & Eng. R. Cas. 310

We do not understand, then, in actions brought under the statute, that it is material whether the servants of the company operated the train carefully when there is an omission to fence, by reason of which stock get on the track, and the injuries to them which result therefrom, upon or near its track, are caused by a moving train. For this reason we

have assumed that there was no negligence of the servants of the defendants in the operation of the train, although the evidence indicates that there were but two places where the animals could have left the track without some difficulty or danger. So that, under our statute, when the killing or injury to stock is caused by a moving train at a place where the company has failed to fence, where the duty to fence existed, and the facts are so alleged and proved, a case of negligence is made out, unless the defendant can show contributory negligence or misconduct. In the case at bar the mare got on the track for want of a fence, where the duty to fence existed, and, frightened at an approaching train, fled down the track to escape the danger, and in that flight ran into an open trestle and was injured. It was the want of a fence along the track at a place where it ought to have been fenced that permitted the mare to get on the track, and the injury which resulted to her therefrom was directly caused by a moving train. The want of a fence, therefore, in connection with the moving train, was the proximate cause of the injury, and rendered the company liable under the terms of the statute, without actual collision.

In this view we do not think there was any error, and the judgment of the court below must be affirmed.

Killing Stock—Liability of Company Where Injury Does Not Result from Actual Contact with Train.—There is considerable confusion in the cases as to the proper construction of statutes imposing a liability on railroad companies for killing stock, where the injury or death does not result from an actual collision between the animal and the company's engine or cars. A great deal, but not all, of this conflict may be explained by the varying terms of the statutes which impose the liability. For the law upon this subject see Knight *v.* New York, L. E. & W. R. Co. (N. Y.), 23 Am. & Eng. R. Cas. 188, note 190; Croy *v.* Louisville, N. A. & C. R. Co. (Ind.), 19 *Id.* 608, note 610; Pennsylvania Co. *v.* Dunlap (Ind.), 31 *Id.* 512; International & G. N. R. Co. *v.* Hughes (Tex.), 31 *Id.* 569; Liston *v.* Central Iowa R. Co. (Iowa), 26 *Id.* 593; Burlington & M. R. R. Co. *v.* Shoemaker (Neb.), 22 *Id.* 565; Schertz *v.* Indianapolis, B. & W. R. Co. (Ill.), 15 *Id.* 523; Holden *v.* Chicago, St. L. & N. O. R. Co. (Tenn.), 13 *Id.* 567; Seibert *v.* Missouri, K. & T. R. Co. (Mo.), 6 *Id.* 584.

Evidence That Horse Was Struck by Engine—Condition of Cow Catcher.—In an action against a railroad company for the killing of a horse upon its track, evidence that an engine, coming from the direction of the place where the horse was killed on the morning of the accident, had upon its cow catcher fresh dung, blood, and hair, is admissible. International & G. N. C. Co. *v.* Hughes, 81 Tex. 184.

Proof That Cattle Were Killed by Company's Trains.—It is competent to prove by circumstantial evidence that cattle found dead along a railway track were killed by the company's trains. Gulf C. & S. F. R. Co. *v.* Washington (C. C. A.), 49 Fed. Rep. 347.

Statutory Liability for Killing of Animals on Unfenced Track.—In Heller *v.* Abbot, 79 Wis. 409, it was held that a railroad company, which has failed

to erect fences and cattle guards, as required by law, is liable under the statute for the killing of horses when on its unfenced track, in the absence of evidence that the owner drove them upon the right of way or abandoned them in a place where it is certain that they would go upon the track.

BOSTWICK

v.

MINNEAPOLIS & PACIFIC R. CO.

(*North Dakota Supreme Court, February 29, 1892.*)

Live Stock—Duty of Owner to Restrain—Common-Law Rule.—In this state the common-law rule relative to domestic animals is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damages that his stock may do on the premises of another, whether fenced or unfenced.

Animal Trespassing on Track—Obligation of Company.—But the fact that plaintiff's horse was a trespasser upon the railroad track of defendant, without any actual fault of plaintiff, did not relieve defendant, after the presence and peril of the horse were known to it, from the obligation to exercise ordinary care in the management of its trains to prevent an injury to the horse.

Concurrent Negligence—Proximate Cause.—Where one party has been negligent, and a second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of such injury.

APPEAL from Richland District Court.

Action to recover damages for an injury to a horse. Verdict and judgment for plaintiff. From an order refusing a new trial defendant appeals.

Newman & Resser, for appellant.

McCumber & Bogart, for respondent.

BARTHOLOMEW, J.—We quote from the statement of facts in appellant's brief: "The action was brought in justice court to recover damages alleged to have been done to plaintiff's horse by a passenger train of the defendant. Plaintiff recovered, and on appeal the cause was tried *de novo* in the district court, and a verdict rendered for plaintiff. A motion for new trial was made and overruled, and defendant appealed from the order refusing a new trial. The material allegations of plaintiff's complaint are the fourth and fifth paragraphs, and are as follows: 'That on said last-

Facts.

mentioned day plaintiff's said horse casually, and without the fault of the said plaintiff, at the station of Fairmount, in said county and territory, strayed in and upon the right of way of said railroad company; that said company, by its agents, servants and employes, so negligently and carelessly handled and run its said cars that the same was, at said time and place, run into and over the said horse.' The facts, as shown by the testimony, are as follows: That at the time in question the defendant was running its regular passenger train on schedule time from Fairmount west. The train was in charge of an experienced engineer, who had been running on the road nearly three years. The engine was equipped with all the modern appliances for safety that were at that time in use upon passenger engines, and they were all in good order. The train consisted of the engine and two cars, and was not at any time run at more than the ordinary speed of twenty miles an hour. At and before the time of the accident the engineer was at his position on the right hand side of the engine, and the fireman on the left hand side, keeping a lookout. It was necessary for the engineer to remain on the right hand side of the engine, and the duty of the fireman to keep a lookout on the left. The country is level prairie, and there was no obstruction to the view from the train along the highway. Plaintiff's house and barn were upon the the south side of the track, (left hand side of the train), about half a mile east of the place of the accident, and about ten rods from defendant's track, and the same distance west from the track of C. M. & St. P. R. R., which crosses defendant's track at right angles. About half an mile west of this crossing and of plaintiff's barn is the sleigh crossing at which the accident occurred. Plaintiff's horse was in this barn. Plaintiff's servant went to the barn to water the horse, and opened the door and went in. The horse slipped his halter, and ran out, and finally ran onto the public highway, which runs for half a mile parallel to defendant's track, about four rods distant therefrom, and then turns at right angles and crosses the track. The horse ran along this highway west towards the crossing, and plaintiff's servant followed him up as fast as he could. The snow was deep, and there was no other track through it than that of the public highway mentioned. When defendant's train started up, after stopping at the C. M. & St. P. R. R. crossing, the horse was on the highway about one-fourth the way from the Milwaukee crossing, going west 'at a pretty good jog.' Defendant's train increased its speed until, at the whistling-post, it was running about twenty miles per hour. At this whistling post, eighty rods east of the sleigh crossing where the acci-

dent occurred the engine gave the whistling signal required by the rules of the company. The horse was then fifteen or twenty rods ahead of the train. About fifty or sixty rods east of the sleigh crossing the engineer first saw the horse." We quote now from the engineer's testimony on his direct examination, when first put upon the stand: "When I saw the horse I put the air on to stop the engine. I set the air-brakes. The engine slowed down materially at that time; came almost to a standstill. I directed the fireman to keep a lookout for the horse, to notify me of its movements. When we got nearly to the track the fireman said, 'George, he is moving towards us.' I put the air on again."

It should perhaps be stated that respondent's evidence tended to show that no effort whatever was made to stop the train until about the moment of the accident. The snow was deep, and the traveled track had become raised somewhat by snow repeatedly blowing upon it, and for this cause the snow was unusually deep on either side of the track. This general condition was known to the engineer, and also the fact that no track led from the traveled way before it crossed the railroad track. The horse had one of its forefeet cut off. The foot was found between the rails. The horse, thus maimed, was on the south side of the track as the train passed it.

From this statement of facts the jury were warranted in reaching the conclusion that defendant's servants did not use ordinary care in their efforts to stop the train after the horse was seen by them, and before reaching the highway crossing. If respondent's testimony was true, they used no efforts. If the engineer's testimony was true, it shows that he might easily have stopped the train some distance before reaching the crossing. He says when he first saw the horse he set the air-brakes, and brought the train almost to a standstill; that he then directed the fireman to watch the horse and report his movements; and that, when they had almost reached the crossing, at a warning from the fireman he "put on the air again." It is clear that, from the time he directed the fireman to watch the horse until he received the warning, he did nothing to stop the train, but, on the contrary, was pulling it ahead. True, he subsequently testified that he did all that could be done to stop the train, but the jury had a right to take his first statement.

At the time the horse was first seen by defendant's servants, did they understand or ought they to have understood, that the horse was in peril? The engineer says he did not consider the horse in danger. But that was not

the test. Were the circumstances, as known to him, such as would have induced the belief in the mind of a man of ordinary prudence that the horse was in danger? Shear. & R. Neg. § 99; Washington *v.* Baltimore & O. R. Co., 17 W. Va: 190, 10 Am. & Eng. R. Cas. 749. When the train was at the whistling-post, 80 rods east of the highway crossing, and running 20 miles an hour, the horse was in the parallel highway 15 or 20 rods ahead of the train. When the train had passed the whistling-post 20 or 30 rods the engineer saw the horse. Certainly the horse could not have gained any upon the train, and, at most, could not have been more than 20 rods ahead of the train at that time. He was on the traveled track, deep snow on either side, running in fright from the train. If he left the traveled track it would be to go into deep snow, where he could not run, and if he continued upon the traveled track he must inevitably cross the railroad track a very short distance ahead. If train and horse reached the crossing at the same instant, injury to the horse must result. The conditions were known to the engineer. We think the jury warranted in believing that the engineer understood, or ought to have understood, the peril of the horse when he first saw it.

Engineer ought to have understood horse's peril.

There are errors assigned upon the admission and rejection of certain testimony. None of these assignments raise any question of general interest. We have examined them, but find no prejudicial error.

It is also claimed that the evidence does not support the verdict in certain particulars. We have read the testimony with care, and think that, under the instructions, it has ample support. We will notice one point. It is claimed to be undisputed that the horse ran against the side of the engine, and that the engine did not run against the horse. Perhaps the point is not very material. The engineer swears to it positively. No witness supports him. Two of plaintiff's witnesses, while admitting that from their respective positions they could not be positive, yet they both thought that the horse reached the track ahead of the engine. If the engine moved suddenly and rapidly in front of the horse when he was so near the railroad track that he could neither stop nor turn, we are not able to see why appellant's liability should be different from what it would be if the horse reached the point of intersection an imperceptible instant ahead of the engine. But the engineer testified that the train stopped in the distance of about a car's length after the collision, and then pulled one or two hundred feet beyond the crossing; hence appellant

Whether engine ran over horse.

argues that it is undisputed that the train must have been going quite slowly at the time, and that the defendant should no more be held responsible than if the horse had gone against a standing engine or the last car in a lengthy moving train. It is true no witness in terms swears that the train did not stop on the crossing, but two witnesses swore that the speed of the train was not diminished until the collision occurred. At the whistling post the train was running 20 miles an hour. As men of ordinary judgment, the jury knew that a train running at that speed could not be stopped in a distance of 60 feet. The contradiction was direct in effect, though not in terms. It should be noticed, also, that the conductor of the train, a witness for defendant, testified that the train stopped one or two hundred feet west of the crossing, and mentions no earlier stop, and thinks the train could not have been running 20 miles an hour, because, if so, it could not have been stopped in 200 feet. That testimony indirectly contradicts the testimony of the engineer. In any event, the admitted fact that the horse's foot was cut off by a wheel of the engine, and left between the rails, sufficiently meets the allegation that the engine ran over the horse.

The statute—Instructions given and refused.

Section 5500, Comp. Laws, reads as follows: "All railroad corporations in this territory shall pay full damages to the owner or owners of horses and other stock and cattle that they may negligently and carelessly kill or damage by their cars, locomotives, agents, or employes, along said railroad or its branches, within the territory of Dakota." Section 5501 is as follows: "The killing or damaging of any horses, cattle, or other stock, by the cars or locomotive, along said railroad or branches, shall be *prima facie* evidence of carelessness and negligence of said corporation."

Plaintiff introduced testimony to establish a *prima facie* case under the statute. At the close of this testimony defendant moved the court to direct a verdict, on the theory that the evidence introduced showed contributory negligence on the part of plaintiff of such a character as to defeat a recovery. The motion was denied, and this ruling was assigned as error. At the close of the entire testimony defendant again moved for verdict, urging contributory negligence of plaintiff, and the absence of any negligence on the part of defendant that would render it liable under the circumstances. This motion was denied also, and the ruling assigned as error.

Defendant requested the following instruction: "If the evidence introduced by defendant shows the defendant guilty of no negligence or want of ordinary care, the *prima facie*

case made by plaintiff in proving the injury to the horse in question by defendant's train is overcome, and you must find for the defendant unless the evidence introduced by plaintiff shows affirmatively that defendant or its employes were guilty of gross negligence in injuring the horse." This was refused, and the following instruction given: "If, on the other hand, you shall find from all the evidence in the case that in the killing of this animal the persons in charge of the train at the time were guilty of negligence, that is, they did not exercise that care and prudence which a careful man should have exercised under the circumstances, and that the injury to the animal was the result of want of care on the part of those who had the train in charge, then your verdict must be for the plaintiff for the value of the animal and interest from the time of the injury."

The giving of this instruction and the failure to give the one requested are assigned as error. It will be noticed that these assignments involve the same questions raised by the motions for verdict, and the several assignments may profitably be considered together. Two more points are involved, to-wit, the contributory negligence of plaintiff and the degree of negligence necessary to charge defendant with liability. The discussion of the case took a somewhat wider range than it will be necessary for us to take in deciding it.

Common law rule as to cattle—Animals trespassing on track.

In this state cattle are not free commoners. The common-law rule is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damage done by such stock upon the lands of another whether fenced or unfenced. Comp. Laws, § 5569. We have no statute requiring railroad companies to fence their tracks. Railroad companies are entitled to the exclusive use of their right of way at the points of intersection with public highways, except as against persons and animals upon the highways for the purposes of legitimate passage. The horse escaped from plaintiff's barn by accident. Plaintiff's servant made immediate pursuit, but before the horse was retaken the injury occurred. The learned counsel for appellant claims that, notwithstanding such fresh pursuit, the horse was a trespasser, It is admitted that had the horse been lawfully upon the highway in charge of plaintiff or his servant, and accidentally escaped from control, and such fresh pursuit had been made, he would not then have been a trespasser. But it is claimed that the rule is different where the animal escapes from the owner's premises onto the highway. The point is technical, and without deciding it we will assume that the horse was trespassing. We will admit also, without decid-

ing, that defendant owed no duty to this plaintiff to be on the lookout for trespassing animals, and that as to such animals it owed no duty to sound the whistle or ring the bell or slacken the speed of its train upon approaching a public crossing, unless such trespassing animal had been seen by the persons operating the train, and its peril was, or under the circumstances should have been, known by them. Nor would it then be the duty of the defendant to sound the whistle or ring the bell if such signals would be as likely to increase as to diminish the peril of the animal, nor to slacken the speed of the train, if to do so would endanger the safety of the passengers upon the train.

It is urged that the presence of the horse upon defendant's right of way, of itself and as a matter of law, establishes contributory negligence upon the part of plaintiff of such a character as to defeat a recovery; and the case of Hance *v.* Cayuga, etc., R. Co., 20 N. Y. 428, is cited to sustain the point. Other cases might have been cited. Of the case from New York, Mr. Beach, in his work on Contributory Negligence, at page 241, says: It "stands alone in the New York Reports. The rule in that state is clearly the reverse of this."

Contributory negligence in allowing horse to go on track.

The rule, however, in that state, as we understand it, is based upon a statute requiring railroad companies to fence their right of way. The negligence chargeable to plaintiff is not actual. It is such negligence as exists irrespective of the means by which the animal becomes a trespasser. Plaintiff may have been overpowered and bound hand and foot, and his barn door broken down, and his horse turned into the highway to stray upon defendant's right of way; yet none the less the horse would have been a trespasser and plaintiff chargeable with that negligence which arises from the mere presence of the animal upon the premises of another, and which the law must impute to him before it can logically hold him liable for the damage that may be committed by his animal while thus trespassing. The difficult point in the case is to determine what duties devolve upon the defendant, admitting that the animal was a trespasser, and admitting the negligence of the owner necessarily involved in such trespass.

It is urged upon us with much earnestness and great learning that, under such circumstances, the defendant is liable for willful or wanton conduct or gross negligence. There are many cases which seem to sustain this contention. See Tonawanda R. Co. *v.* Munger, 5 Denio, (N. Y.), 255, affirmed in 4 N. Y. 349; Van Horn *v.* Burlington, C. R. & N. R. Co., 59 Iowa, 33, 7

Duty of defendant to trespassing animals.

Am. & Eng. R. Cas. 591; Eames *v.* Salem & L. R. Co., 98 Mass. 560; Darling *v.* Boston & A. R. Co., 121 Mass. 118; Wright *v.* Boston & M. R. Co., 129 Mass. 440, 2 Am. & Eng. R. Cas. 121; Pittsburg, C. & St. L. R. Co. *v.* Stuart, 71 Ind. 500; Schittenhelms *v.* Louisville & N. R. Co., (Ky.), 19 Am. & Eng. R. Cas. 111; Maynard *v.* Boston & M. R. Co., 115 Mass. 458; Cincinnati, W. & M. R. Co. *v.* Stanley, (Ind. App.) 27 N. E. Rep. 316; Bennett *v.* Chicago & N. W. R. Co., 19 Wis. 158: Vandegrift *v.* Rediker, 22 N. J. Law, 189. In some of these cases the injury was to persons while trespassers, and in others to animals while trespassers. Possibly there is an inclination to adopt somewhat broader grounds of liability, where the injury is to the person instead of property, but the same general doctrines are announced in all of the cases. A careful perusal of these cases fails to discover any discussion of the duties of the defendants after the peril to the trespassing person or animal was known. In the leading case in 5 Den., which was an action to recover the value of certain oxen killed by a train, it appeared that the oxen were trespassers, and were lying down upon the track at night. After they were seen, all reasonable efforts were made to stop the train, but it could not be done in time to avoid the injury. The negligence alleged was the speed of the train, insufficiency of the headlight, and the failure to see the oxen sooner. And in all of these cases—or all to which our attention has been called—it will be found that the negligence upon which a recovery was sought was a failure to see the trespassing person or animals as soon as he or they might have been seen, or a failure to give some signal at a crossing or curve that the law directed should be given. or running a train at a high rate of speed, or some act of a kindred nature that had no reference to any known obstruction or danger. And in these cases the courts have quite uniformly held, particularly where cattle were not free commoners, that, as the defendant railroad company was under no obligations to anticipate the presence of trespassers upon its track, so it was under no obligation to maintain a watch for such trespassers or to do any act looking to their protection.

The language used in some of the cases, notably the New York cases, is broad, and it is stated, without exception or qualification, that, in case of injury to trespassers, there can be no recovery except for the willful or wanton conduct or gross negligence of the defendant; and yet it is apparent at a glance that an entirely different principle is involved when it ceases to be a matter of anticipating trespassers, and their actual presence and peril are known and understood. Another

fact will be found to be quite generally present in the above class of cases, and that is that the plaintiff was in actual fault, was guilty of actual negligence, by some act of commission or omission, from which the injury complained of might reasonably be expected to follow. But in this case, as appears from the statement of facts, plaintiff was chargeable with no actual fault or negligence. The trespass was purely technical, and the trespassing animal was seen by the servants of the defendant, and its peril appreciated in ample time to avoid the injury by the exercise of ordinary care and diligence. Under these circumstances we do not think the harsh rule of law that we have been considering applies. Gross negligence is briefly defined as the absence of slight care. It is that course of conduct which indicates an indifference to consequences. If it be for that only that a defendant can be held liable in a case of this kind, then human life and the rights of property have reached a lower valuation than can be found in any other branch of the law. It was well said in one of the cases that no more in law than in morals can two wrongs make one right. Trespassers, particularly mere technical trespassers, have some rights that must be respected. That they are trespassers does not constitute them outlaws, and if seen, and their peril known, they may not ruthlessly be run down and killed where ordinary care—such care as any prudent man would exercise under the circumstances—would avoid such result. The contrary rule wounds every humane feeling in man's nature; it is opposed to the great golden rule, and cannot be sanctioned by reason. We do not think it is, or ever was, the law. Negligence and contributory negligence must not be confounded. Negligence is contributory when, and only when it directly and proximately induces the injury in whole or in part. Where the negligent acts of two parties concur in producing an injury, neither being able, in the exercise of ordinary care, to avoid the consequences of the negligence of the other after it is known, neither is liable to the other. But where one party has been negligent, and a second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of the injury.

In the case of Isbell *v.* New York & N. H. R. Co., 27 Conn. 393, the action was brought to recover the value of cattle killed by defendant's train, and by reason of negligence in its management. The cattle were trespassers, but plaintiff was guilty of no actual

Same—Authorities reviewed.

wrong or negligence. The case does not disclose whether the cattle were seen or not, and in that respect was weaker than the case at bar. The position of defendant in that case was identical with the position of this defendant, and is thus stated by the court: "The defendants say that, because the cattle were there, it puts the plaintiff, of necessity, in the wrong in the eye of the law, and works a forfeiture of the right to demand the exercise of care on the part of the defendants in running their trains of cars, even though from the want of such care the cattle should be run over and killed." The court in argument say: "A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances,—to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence." The court exhaustively reviews the authorities, and reaches the conclusion that, notwithstanding the technical trespass, defendant was liable for the injury caused by the negligent management of the train; and that, before the negligence of the plaintiff can preclude his right to recover, it must be a proximate, and not a remote, cause of the injury.

A more recent case is Needham *v.* San Francisco & S. J. R. Co., 37 Cal. 409. In that case plaintiff's mare had trespassed upon defendant's track. In her efforts to escape a train she jumped into a bridge over a dry run. The train was stopped before reaching the bridge, but the animal was injured in being removed by the trainmen. The court charged the jury: "If the mare of plaintiff was injured by the want of ordinary care on the part of the employes of defendant in removing her from the railroad, or by reason of their negligence in doing so, the fact that she was wrongfully upon the road does not protect the defendant from liability;" and refused to charge that defendant would be liable only for gross negligence. The trial court was fully sustained on appeal. This case is particularly valuable upon the question of contributory negligence. The court say, on page 419: "About the general rule upon which it is founded—that a plaintiff

cannot recover for the negligence of defendant if his own want of care or negligence has in any degree contributed to the result complained of—there can be no dispute. The reason of the rule is that, both parties being at fault, there can be no apportionment of the damages, and not that the negligence of plaintiff justifies or excuses the negligence of defendant. * * * The law does not justify or excuse the negligence of defendant. It would, notwithstanding the negligence of plaintiff, hold the defendant responsible if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury, being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed when such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover is limited by the reason upon which it is founded." Upon the main question, the principle decided is thus announced in the syllabus: "If the plaintiff is guilty of negligence, or even of possible wrong, in placing his animals on a railroad track, yet the railroad company are bound to exercise reasonable care and diligence in the use of their road, and, if for want of that care the animals are injured, the company is liable."

The law upon this point in this country is largely based upon the case of Davies *v.* Mann, 10 Mees. & W. 549. In that case an ass was turned into the highway shackled, and was run over and killed. A recovery was allowed, and Lord ABINGER, in reviewing the case, said: "Even if this ass was a trespasser, and the defendant might by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." The principle of that case has been well stated, as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is clearly responsible for it." Shear. & R. Neg. § 99. "The mere fact that the plaintiff, when he suffered the injury, was technically trespassing upon defendant's premises, and would not have been injured if he had not so trespassed, is not, of itself, enough to convict him of contributory negligence." Shear. & R. Neg. § 97. Again: "It is now perfectly well settled that the plaintiff may recover damages for

an injury caused by the defendant's negligence, notwithstanding plaintiff's own negligence exposing him to the risk of injury, if such injury was proximately caused by defendant's omission, after becoming aware of plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed." *Id.* § 99.

In the note to Wright *v.* Boston & M. R. Co., 129 Mass. 440, 2 Am. & Eng. R. Cas. 121, cited by appellant, the doctrine is recognized that "the fact that a person is a trespasser on the track does not absolve the company from preventing inflicting an injury upon him, if by the exercise of due care it could be avoided. * * * What is due care on the part of the company, under such circumstances, is necessarily a question of fact, and depends upon the circumstances of each case." Citing Toledo, P. & W. R. Co. *v.* Riley, 47 Ill. 514; Stout *v.* Sioux City & P. R. Co., 2 Dill, (U. S.) 294; Chicago, R. I. & P. R. Co. *v.* Dignan, 56 Ill. 487; Finlayson *v.* Chicago, B. & Q. R. Co., 1 Dill. (U. S.) 579.

Without extending this opinion by further quotations, we cite, in addition to cases already mentioned, and as supporting some or all of the propositions which we announce, the following cases: St. Louis, A. & T. H. R. Co. *v.* Todd, 36 Ill. 409; Peoria, P. & J. R. Co. *v.* Champ, 75 Ill. 577; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500; Palmer *v.* Northern Pac. R. Co., 37 Minn. 223, 31 Am. & Eng. R. Cas. 544; Locke *v.* St. Paul & P. R. Co., 15 Minn. 350, (Gil. 283); Witherell *v.* Milwaukee & St. P. R. Co., 24 Minn. 410; Scheffler *v.* Minneapolis & St. L. R. Co., 32 Minn. 518, 19 Am. & Eng. R. Cas. 173; Memphis & L. R. R. Co. *v.* Korr, 52 Ark. 162, 40 Am. & Eng. R. Cas. 171; Harlan *v.* St. Louis K. C. & N. R. Co., 64 Mo. 480, 65 Mo. 22; Hicks *v.* Pacific R. Co., 64 Mo. 430; Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 480; McCarty *v.* Delaware & H. Canal Co., 17 Hun. (N. Y.) 74; Harty *v.* Central R. Co., 42 N. Y. 472; Kerwhacker *v.* Cleveland, C. & C. R. Co., 3 Ohio St. 172; Central Ohio R. Co. *v.* Lawrence, 13 Ohio St. 67; Washington *v.* Baltimore & O. R. Co., 17 W. Va. 190, 10 Am. & Eng. R. Cas. 749; Lawson *v.* Chicago, R. I. & P. R. Co., 57 Iowa, 672, 13 Am. & Eng. R. Cas. 649; Trow *v.* Vermont Cent. R. Co., 24 Vt. 494; Laude *v.* Chicago & N. W. R. Co., 33 Wis. 640; Pacific R. Co. *v.* Brown, 14 Kan. 469; Atchison, T. & S. F. R. Co. *v.* Davis, 31 Kan. 645, 15 Am. & Eng. R. Cas. 521.

Section 3603, Comp. Laws, reads as follows: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of or-

dinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief." We fully agree with appellant that this does not abrogate the common-law rule as to contributory negligence. It but declares and confirms that rule as recognized and explained in the foregoing cases. But under that statute and the decisions it is clear that the assignments of error which we have been considering are not well taken. It is urged that the instructions did not limit the time in which ordinary care was incumbent upon defendant to the time after the animal was seen. That could not be error in this case. The testimony was all directed to the conduct of defendant's employes after the horse was seen.

Instructions as to defendant's negligence.

The appellant segregates and assigns error upon the following words in the charge: "The plaintiff in the case offered further proof, over and beyond the presumption of law, showing negligence on the part of the company and those in its employ." This language is unfortunate, and the instructions would have been better without it. It is one of those oversights which are well-nigh inseparable from the haste of jury trial. Immediately following this language the court said; "Now, you are instructed that the liability of this defendant, if it is liable in this case, depends entirely upon its negligence. It is not liable simply because it may have killed the horse; and if you find that in killing this animal the railroad company was not negligent,—was not guilty,—or, rather, did not fail to exercise that care and prudence which a prudent man would under the circumstances, then your verdict must be for defendant. If, on the other hand, you shall find from all the evidence in the case that in the killing of this animal the persons in charge of the train at the time were guilty of negligence, that is, they did not exercise that care and prudence which a careful man should have exercised under the circumstances, and that the injury to the animal was the result of want of care on the part of those who had the train in charge, then," etc. Read with the context, we are clear that the court had no right of passing upon the weight of testimony, but simply meant that the plaintiff introduced further testimony for the purpose of showing negligence, and we think the jury must have so understood it. We are not inclined to relax in the least the rule that makes the jurors the sole arbiters of the facts, yet, in a case where it is so apparent as

in this that exact justice has been done, we are not warranted in reversing the case for a mere oversight of the trial judge which we are clear in no manner prejudiced the appellant.

The judgment of the district court is affirmed. All concur.

Killing Stock—Obligation of Company to Avoid Injury to Animals Trespassing on Track.—See Missouri Pacific R. Co. *v.* Gibney, (Kan.) 45 Am. & Eng. R. Cas. 492, note 495; Memphis & L. R. R. Co. *v.* Kerr, (Ark.) 40 *Id.* 171, note 172.

WARD

v.

WILMINGTON & WELDON R. CO.

(*North Carolina Supreme Court, December 9, 1891.*)

Killing Stock—Obstructions on Right of Way—Duty of Company to Remove.—In an action against a railroad company for killing a horse which suddenly ran upon the track from among high weeds and bushes on the right of way, where it was hidden from view, it is error for the court to instruct the jury that it is negligence for a railroad company to allow weeds and bushes to grow "near to" or "in close proximity" to the track,—and that, if the injury resulted because the horse was so concealed that the engineer could not see him in time to stop, the company is liable. The court will not enjoin upon railroad companies the duty of ousting owners of abutting land who cultivate a portion of the right of way, and of seeing that it is kept free of corn stalks or weeds, which might hide from view cattle on the right of way.

Judicial Notice—Cultivation of Right of Way by Abutting Owners.—The court will take judicial notice of the fact that it is the universal custom of railroad companies to allow the abutting owner, whose land has been taken for a right of way, to cultivate such right of way up to the side of the drainage ditches of the railroad.

MERRION, C. J. dissenting.

APPEAL from Pender Superior Court.

Action to recover damages for the killing of plaintiff's horse. There was judgment for plaintiff, and defendant appeals.

The issues submitted, with the responses by the jury, were as follows: "(1) Did defendant, by its negligence in moving its cars and engines, kill the horse of the plaintiff? Yes. (2) If yes, what damage has plaintiff sustained thereby? $88." There was testimony offered on the part of the plaintiff tending to show that within six months before the beginning of this action the defendant had killed the horse of the

plaintiff by running against him, in the day-time, with a freight train running on defendant's road; and also testimony as to the value of the horse. Defendant introduced the engineer, fireman, and others who were on the train at the time of the killing of the horse. They testified that the train was a long and heavy freight train, running rapidly and with great momentum; that the engineer in charge of the train was on the vigilant lookout for stock in front of the train, but that weeds and bushes had grown up close to the track of defendant's road—at that point within two feet of the track as high as plaintiff's horse; that the horse was concealed from the engineer by these weeds and bushes until the train was close upon him, when he suddenly emerged from the weeds and bushes on to the track; that the engineer, immediately on seeing the horse, he being on the lookout to the front, blew down brakes, blew the cattle alarm, and reversed his engine; that the brakes were applied, but that the horse was so close to the train that all these efforts were unavailing, and the train ran over the horse and killed him. Defendant asked his honor to instruct the jury: "If the jury believed that the engineer, as soon as he could, by looking out and being on the watch, discovered the horse, and then used all the efforts at his command to stop the train, and could not do so in time to keep from striking the horse, then the defendant was not guilty of negligence, and plaintiff could not recover." His honor told the jury that this would be true unless the defendant had negligently allowed bushes and weeds to grow on its right of way so close to its track that the horse was concealed thereby until it was too late to stop the train and prevent his destruction. Defendant further asked his honor to instruct that, "if the jury should believe that the engineer was prevented from seeing the horse, or would have been prevented from seeing the horse had he been on the careful lookout, by the weeds and bushes growing within two feet of the ends of the cross-ties on the side of the road on which the horse was killed, and the said bushes were three or four feet high, then the *prima facie* case in favor of the plaintiff would be rebutted, and jury should find first issue in favor of defendant." The substance of the instruction given is embodied in the opinion of the court. There was a verdict for plaintiff. Defendant moved for a new trial on account of the refusal of the court to give the instructions asked for, and for alleged error in the instructions given.

Haywood & Haywood, for appellant.

AVERY, J.—It is settled law in this state that, if an engineer in charge of an engine sees, or can, by keeping a careful

lookout, see, a cow or horse upon the track in his front, it is his duty to stop the train if he can do so without peril to the passengers and property under his charge by the use of all the appliances for checking the speed at his command. Carlton *v.* Wilmington & W. R. Co., 104 N. C. 365, 40 Am. & Eng. R. Cas. 178; Wilson *v.* Norfolk & S. R. Co., 90 N. C. 69, 19 Am. & Eng. R. Cas. 453; Snowden *v.* Norfolk & S. R. Co., 95 N. C. 93; Bullock *v.* Wilmington & W. R. Co., 105 N. C. 180, 42 Am. & Eng. R. Cas. 93; Deans *v.* Wilmington & W. R. Co., 107 N. C. 686, 45 Am. & Eng. R. Cas. 45. If, by the exercise of ordinary care, the engineer can discover that an animal is greatly frightened, and is running apparently excitedly and wildly beside and near the track, or continues on and sometimes off it, it is the duty of the engineer to "slacken the speed, keep the engine under his control," and, if necessary, "stop it," until the animal is out of danger. Wilson *v.* Railroad Co., *supra*. "When the cattle are quietly grazing, resting, or moving near the track,—not on it,—manifesting no disposition to go on it, the speed of the train need not be checked." Wilson *v.* Railroad Co., *supra*.

Duty of engineer as to cattle on track.

We have thus stated the general rules laid down by this court in reference to the negligence in injuring live-stock, in order the more intelligently to discuss the instruction given by the court in the case at bar, that, even though the engineer could not, by keeping the most vigilant outlook, discover that the plaintiff's horse was in the vicinity of the track in time to stop the engine, yet "it was the duty of the defendant to keep its right of way near its track reasonably clear of weeds and bushes, which might conceal stock approaching its road until it was too late to stop a train and prevent their destruction;" and that, "if they [the jury] believed that the horse was killed because he was so concealed by weeds and bushes, which the defendant had negligently permitted to grow up in close proximity to the track," that the engineer could not see in time to avert the injury, the defendant's negligence was the proximate cause of it.

Instruction complained of.

We take notice of the fact that, whatever may be the privilege of railroad companies to exercise dominion over their whole right of way, the universal custom has been to allow the abutting owner, whose land has been taken for the use of the public, to cultivate up to the side ditches that are kept open for the purposes of proper drainage by the company. While we concede that it is the duty of the corporation in constructing its road to cut down the large trees that might fall on or be

Cultivation of right of way by abutting owners.

thrown upon the track, we would be loth to give our sanction to any ruling that would make it incumbent upon them, in order to protect themselves from liability, to take actual possession of any portion of the right of way, not needed for corporate purposes proper, namely, to remove from it corn, grain, high grass, weeds, or bushes, that may spring up immediately outside of the ditches and grow upon cultivated land, high enough to conceal a horse or cow from the view of an engineer who is approaching with a moving train.

Negligence of company in permitting obstructions on right of way.

It is important that every principle of law, to which the conduct of the citizen is to be made to conform, should mark out the line of his duty with reasonable certainty. It is essential, in order to insure the transportation of passengers and freight with the dispatch and promptness that will meet the wants of a commercial people, that the managers of railroads should have a definite idea of the duties and liabilities of the companies, and should be able, by using proper precaution, to provide against them without subjecting the public to serious inconvenience or delay. If, therefore, the judge had told the jury that it was negligence to suffer weeds and bushes to grow in or upon the banks of the ditches of which the companies assume actual control and dominion to a sufficient height to obstruct the view of persons or animals from an approaching engine, he would have fixed a known and well-defined boundary line up to which the corporate authorities would be required to remove such obstructions, and would at the same time have held them bound to discharge a duty, which is but the exercise of ordinary diligence on their part. To burden these corporations with the further duty of removing such obstructions beyond the territory of which they assume actual control for corporate purposes is not only to license but to compel them, for their own security, to cut down corn or grain as well as weeds when it springs up so high as to hide cattle from view, and thus enable the engineer to see whether they are grazing quietly or moving about frantically as a train draws near to them. The court below laid down the indefinite rule that it was negligence to allow weeds or bushes to grow "near to" or "in close proximity" to the track. He left the precise distance to which the duty extended so vague and uncertain that railroad companies cannot provide against liability, however watchful their servants may be, except by assuming actual control and keeping clear of corn, grain, grass, weeds, and bushes the whole right of way, especially where there are curves so sharp that the line of vision of the engineer in looking to his front would cross the

right of way at or near its outer boundary line. "Near," in common parlance, is understood and by lexicographers is defined to mean either "close" or "at no great distance;" while "in close proximity," or "in the immediate vicinity," are equivalent terms; and either of the expressions might have been understood by the jury as a declaration that it was negligence to leave weeds or bushes that would hide cattle from view anywhere on the right of way. One hundred feet from the center of the railroad (the ordinary limit of the right of way) would be considered by men of intelligence as at no great distance from or in the immediate vicinity of a track, and the instruction was therefore misleading, unless we intend to enjoin upon railroad companies the duty of ousting the owners of the abutting land and seeing that it is kept clear of corn-stalks or weeds, which, under good culture, would, after the crops are gathered, hide from view cattle on the right of way in the immediate vicinity of the track.

In order to provide against liability under the rule laid down by his honor, railroad companies must either assume such control of the right of way, or the fast trains by which the companies have contracted for the expeditious transportation of the mails, persons, and property must stop and "beat the bushes" at every curve in the line where the soil is rich in order to ascertain whether a cow or horse can be made to emerge from them before proceeding on their important mission. Where bushes are allowed to grow in or inside of the ditches along the portion of the right of way of which the corporations assume actual control, so as to obstruct the view of an engineer on an approaching train, a greater degree of care does devolve upon the company, just as we have said in Hinkle *v.* Richmond & D. R. Co., 13 S. E. Rep. 884, (decided at this term,) that where a company suffers cars or other obstructions to be placed on a side track, so as to shut off the view of a moving train from a traveler driving towards a crossing on the line, it is negligence in an engineer to fail to give notice of his approach. Loucks *v.* Chicago, M. & St. P. R. Co., 19 Am. & Eng. R. Cas. 312; notes and authorities cited; Alabama G. S. R. Co. *v.* Moody, 45 Am. & Eng. R. Cas. 524, and notes, page 527 *et seq.*

We think that the court below erred in fixing upon corporations the duty of removing obstructions, such as weeds or corn-stalks, that are incident to the ordinary course of husbandry outside of the portions of the right of way, including side tracks under the actual control of the companies. It is, of course, the duty of the company to con-

struct the road properly, and in such a manner as will not expose travelers to needless dangers. It is incumbent on them, as we have said, to remove all trees from the right of way, and also any structure that is liable to fall upon passing trains or upon the track so as to obstruct it. But in our case the question is as to their duty in reference to the right of way outside of the track and ditches, and after the completion of the road, in reference to weeds and bushes that may spring up while the land is being cultivated with ordinary care.

There was error, for which the defendant is entitled to a new trial.

MERRIMON, C. J., dissented.

CLARK, J., (*concurring.*)—It is the duty of a railroad company, as to its patrons, to keep the road-bed in good condition, and for that purpose to keep enough of its right of way clear to prevent accident from trees or limbs falling upon its track. It owes no duties as to the condition of its right of way or of its track as to others, except the statutory duty as to crossings. If a trestle is so defective that a foot-passenger, who chooses to walk thereon instead of in the highway, falls through and is hurt, would the company be liable? Or if a dead tree left standing on the right of way falls and kills stock pasturing there, must the company respond in damages? Or suppose stock frightened by the whistle or the noise of the train fall into a ditch on the right of way, must the corporation pay? I wot not. If accident from these causes occurs to those to whom the company owes duties, it would be liable; but it is no part of its duty to furnish a safe footpath for people or safe pasturage for cattle. If the man or the cattle are on the track, it is the duty of the company to avoid injury to them if, by the exercise of a proper lookout and care, it can do so. But the principle goes no further. There are in this state about 3,500 miles of railroad, and every year extends the mileage. If these companies are guilty of negligence, if they do not keep their right of way, 3,500 miles in length, and 200 feet wide, shrubbed, so that a piny-woods cow or a razor-back hog may not always be visible thereon, or in default of that are guilty of negligence if they do not slacken speed and "beat the bushes" whenever high enough and dense enough to conceal the recumbent forms of those interesting animals, who otherwise might be startled from their slumbers and rush upon the track, then the duty required of engineers, and the expense imposed upon the companies, will not be "trivial." The railroads own the

right of way. It belongs to them for the purposes of their traffic. All that can be required of them, as to others than its passengers and freight, is the good old rule that it use its own in such manner as not to injure others. It is not required to put its track or right of way in good condition for the safe use of others, who pay nothing to them to enable them to do so. In those cases, where railroads have been held for fire originating on their right of way, the negligence was not in allowing the grass to grow there,—they are not expected to keep the right of way plowed up,—but in using defective spark-arresters, or negligently using them, so that fire is communicated to the inflammable grass or matter, and thence passes to the property of others, which is thereby destroyed. In the present case the prayer for instruction that if "the engineer did not, and by the exercise of a diligent lookout could not, have seen the stock on the track in time to avoid the injury, the issue should be answered in favor of the defendant," was warranted by Carlton's Case, 104 N. C. 365, 40 Am. & Eng. R. Cas. 178, and other precedents, and should have been given in the form asked, without the modification made by the court below.

MERRIMON, C. J., (*dissenting.*)—In this state a railroad company is not required to inclose its railroad by fence or otherwise, and hence it is not regarded or treated in law as a trespass, if the live-stock of farmers and others at large in the forests or fields wander upon its road or graze upon its right of way. If such live-stock, so wandering, shall be negligently killed by its moving locomotives or trains, it will be answerable to the person whose property shall be so injured in damages. Indeed, the statute (Code, § 2326) prescribes that such killing of stock shall *prima facie* be negligently done, and the burden of proving the absence of negligence in such case is put upon the railroad company. Such company is bound to reasonable care and diligence in preventing such injuries. It is therefore its duty to keep its roadway in such reasonable condition as will prevent the killing of stock, and as well to prevent possible injury arising therefrom to passengers and freight passing over its road, and injury to its own property. It is negligence on its part when it fails to do so. To prevent such injuries, it is bound to keep its roadway, as far as practicable, free from such things as will obstruct the view of the engine-man looking ahead of the moving train. He should be able to see stock of all kinds on the road or the roadway, in order that he may be able to sound the danger alarm as early as practicable, and frighten the stock away, and to put his engine in condition to stop

the train promptly. If bushes, weeds, grass and the like are permitted to grow upon the roadway, unrestrained, they not infrequently, particularly where the soil is rich, grow so high and thickly as to hide the animal grazing there, and prevent the engine-man from seeing it until the engine is almost upon it. He then sounds the alarm. This and the rushing train alarms the animal, and it at once springs upon the track, is killed, the train may be thrown off the track, passengers killed or wounded, or freight injured or ruined. All this may easily happen,—has happened. It may be easily prevented by keeping the roadway clear from bushes and high weeds that grow thickly. But for such growth, the stock would generally be seen in ample time to frighten them off, or stop the train, and thus sometimes prevent damage very serious in its extent and nature. The cost of keeping the roadway clear is trifling, compared with the loss occasioned by failing to do so. Indeed one of the very purposes of the broad roadway allowed to railroad companies is to prevent injuries like those mentioned. It is expected and intended that it shall be kept reasonably clean and free from all such things as will give rise to injury and danger. Hence it has oftentimes been held that it is negligence to allow dry grass to remain on the roadway, or dry, decaying cross-ties and the like to remain there, because they easily take fire, and thus frequently spread devastation. In possible cases, no doubt, it may be that the roadway cannot be kept clear; but such cases are not general nor common. Nor is this any reason why it shall not be done when practicable. It is said that such a requirement will drive the railroad company to assert its right against farmers and others who are generally allowed as a matter of favor to cultivate the land freely and closely to the road track. This is an unfounded apprehension. Stock are not allowed to go at large in the fields where corn, wheat, rye, and tobacco and the like grow, and there is hence no danger arising from cattle straying in the cultivated fields. In the present case, if the bushes and grass had not been permitted to grow so high and stand in the roadway, the possibility, the strong probability, is that the animal would not have been killed, but in the bushes and grass the engine-man might—would have—seen the animal long before he did, and frightened it away, or he might readily have slackened the speed of the train, or, if need be, stopped it. It was fortunate that the train was not thrown from the track, and greater damage done. I cannot hesitate to say that, in my judgment, the defendant was justly chargeable with negligence, and that the charge of the court to the jury was reasonable and just.

DAVIS, J.—I concur in the above dissenting opinion of the Chief Justice.

Negligence of Engineer Seeing Animal on Track.—In an action for the negligent killing of a horse, a verdict against the railroad company will not be set aside where it appears that the train was running a little down grade but not fast, that the horse was in an unfenced pasture, and got upon the track a little ahead of the locomotive and was overtaken and killed, and that nothing prevented the engineer from seeing the horse. Woodland *v.* Union Pacific R. Co. (Utah, April 2, 1891), 26 Pac. Rep. 298.

Evidence that a horse was knocked by a locomotive thirty-two steps when hit by the cars, which were running at unusual speed; that the horse was close to the track and could have been seen for a long distance, that no whistle was blown or bell rung, and that the speed of the train was not slackened until the horse was struck; and testimony of the engineer that he did not slacken speed until within one hundred and fifty-two feet of the horse, although he was seen more than a quarter of a mile away,—is sufficient to go to the jury upon the question of the negligence of the company. Johnson *v.* Rio Grande, Western R. Co., (Utah, June 9, 1891), 26 Pac. Rep. 926.

In Elmsley *v.* Georgia Racific R. Co., (Miss. Oct. Term, 1891) 10 So. Rep. 41, it was held that if the engineer of a locomotive, with full knowledge of the danger of an animal on the right of way ahead, elects to take the chance of the animal's remaining quiet, he does so at the risk of his employer and not at that of the owner of the animal.

In Kansas City M. & B. R. Co. *v.* Deaton, (Miss., May 25, 1891) 9 So. Rep. 828, which was an action for killing a horse, the animal was shown to have run for one hundred and fifty yards down the track, before reaching the trestle. The court held that this was not at all in conflict with the evidence of the engineer that he only saw the horse when within forty or fifty yards of him and that he could not have seen him earlier under the existing conditions. The engineer's testimony was not discredited and was not in conflict with the testimony of plaintiff's witness, and a judgment for the plaintiff was therefore reversed.

Instruction as to Degree of Care Required of Engineer.—In an action for the killing of a mule, struck by a locomotive on the prairie in broad daylight, three passengers on the train testified that they saw a bunch of mules ahead of the train; that they ran a considerable distance along the track; that the train was running at a good speed, and was not slowed up until it ran into and scattered the mules; and that it seemed as if the engineer were trying to run them down. Defendant failed to call the engineer as a witness, or to offer any evidence on this issue. *Held* harmless error to charge that the engineer was bound to use the "utmost" care, as it was evident that no care whatever was exercised. St. Louis & S. F. R. Co. *v.* O'Loughlin, (C. C. A.), 49 Fed. Rep. 440.

In an action for killing stock in the Indian Territory it was error to refuse an instruction that the company owed the owner no duty except to use ordinary care to avoid injuring the stock after the engineer discovered it upon the track, or after he might have discovered it by the use of ordinary and reasonable care. Gulf C. & S. F. R. Co. *v.* Ellidge, (C. C. A.), 49 Fed. Rep. 356.

Sufficiency of Evidence to Infer Negligence on Part of Engineer.—In East Tennessee, V. & G. R. Co. *v.* Baker (Ala., Nov. 11, 1891), 10 So. Rep. 211, the evidence for the plaintiff tended to show that the mule, for the killing of which the action was brought, came upon defendant's track from the west side; that the field on that side was open and free of obstructions so

that the engineer could see animals approaching from that direction; that the mule came upon the track seventy or seventy-five yards from the point where it was killed, and, without leaving the track, ran that distance ahead of the engine. The evidence for the defendant, on the other hand, tended to show that the mule came from the east side; that on that side there were obstructions to cut off the engineer's view; that the mule first ran across the track and then came back upon it the second time, just ahead of the engine, and ran along the track but a very short distance before it was struck and killed; that from the point where the mule first crossed the track to the place where it was killed was about fifty yards. *Held*, that it was the province of the jury to accept or reject the one or the other of these versions, and that, as there was evidence from which the jury could have drawn an inference of negligence on the part of the defendant, a general charge in its favor should not have been given.

Failure of Engineer to Keep a Lookout Prior to Injury.—In an action against a railroad company for killing a mule, an instruction that, if the engineer was "on the lookout for obstructions at the time he discovered the mule," defendant was not liable, was properly refused, because, under it, the jury might have found for defendant, though they were satisfied that the engineer was negligent in not maintaining such a lookout prior to the time of actual discovery as would have enabled him to discover the mule sooner than he did. East Tennessee, V. & G. R. Co. *v.* Baker (Ala., Nov. 11, 1891), 10 So. Rep. 211.

In an action to recover damages for injuries to cattle, the only negligence alleged being the failure of the engineer "to reverse the engine, blow the whistle, or use the proper diligence and means at his command to avoid the accident," a recovery cannot be had on proof of his negligence in failing to keep a proper lookout, whereby he might sooner have discovered the animal on or near the track. Mobile & Birmingham R. Co. *v.* Ladd, 92 Ala. 287.

Negligence of Engineer—Horse Running at Large.—In an action against a railroad company for the killing of a mare by one of its trains, where the mare was running at large, an instruction that it was the engineer's duty to ring the bell, and blow the whistle, and reverse the engine, and to do everything in his power, in the ordinary discharge of his duty, to save the animal's life, is erroneous, as, in the case of animals running at large, the railroad company is not bound to exercise the utmost care in running its trains, but only such reasonable care as a prudent man, engaged in the same business, would use to prevent injury to or destruction of animals. Kansas City, M. & B. R. Co. *v.* Cantrell (Miss., Feb. 1, 1892), 10 So. Rep. 580.

Same—Quality of Locomotive Headlight—Evidence in Rebuttal.—In an action to recover damages for injuries to stock by a railroad train at night, the defendant's engineer and fireman having testified that they did not discover the animal on the track in time to avert the injury, and that the headlight did not enable them to see an animal on the track more than sixty feet in advance of the engine, it is competent for the plaintiff, in rebuttal, to prove facts showing that on other occasions, in the same neighborhood, and under circumstances no more favorable, objects on or near the track were visible at a distance of two or three hundred yards by the aid of the headlight. Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279.

Evidence as to Distance at Which Cattle Could Have Been Seen by Engineer.—In an action to recover damages for the killing of stock, a witness, who is familiar with the track at the place where the accident occurred, is competent to testify as to the distance at which cattle on the track could be seen by locomotive engineers. Such testimony is not ob-

jectionable as being the statement of an opinion. Gulf, C. & S. F. R. Co. *v.* Washington (C. C. A.), 49 Fed. Rep. 347.

Horse Frightened While on Road Parallel with Track—Failure of Engineer to Give Signal.—Where the plaintiff's horse took fright while being driven along the public road running parallel with the railroad, and the cause of the fright, according to the evidence, being the headlight of the engine, and not the speed of the train, the failure of the engineer to comply with the statute by blowing the whistle and checking the train while approaching a public crossing 125 yards beyond where the injury took place will not render the company liable for the consequences resulting to the horse and buggy under fright thus occasioned. Douglass *v.* East Tennessee, V. & G. R. Co. (Ga., Feb. 1, 1892), 14 S. E. Rep. 616.

Stock Killed Owing to Inevitable Accident.—When the evidence shows conclusively that the servants of a railroad company used all ordinary and reasonable care and diligence to prevent the killing of a certain cow, a verdict in favor of the owner for the value of the animal is contrary to law and the evidence, and should be set aside. Georgia R. & B. Co. *v.* Walker, 87 Ga. 204.

Animals Going on Track at Crossing.—It is not negligence for a railroad company to leave a train of freight cars standing on a siding near a crossing, provided the crossing itself is kept unobstructed; and the fact that a mule, wandering up the track from the crossing, was concealed by the freight cars from the engineer of a rapidly approaching train until it came around the end of the freight cars onto the main track at so little distance that is was impossible to stop the train before the mule was struck, will not render the company liable therefor. Hyer *v.* Chamberlain, 46 Fed. Rep. 341.

Conflicting Evidence—Question for Jury.—In an action against a railroad company for the killing of plaintiff's mare by one of defendant's trains, defendant's employes testified that the night was dark, that the mare jumped on the track only a short distance in front of the train, and that the collision could not be avoided; while plaintiff's witnesses testified that the night was bright, and that the mare's tracks were found running several hundred yards down the track, until she was overtaken and killed. *Held*, that an instruction to find for defendant was properly refused. Kansas City, M. & B. R. Co. *v.* Cantrell (Miss., Feb. 1, 1892), 10 So. Rep. 580.

Degree of Diligence Required in Looking for Stock—Fields and Uninclosed Lands.—In an action against a railroad company for the killing of stock, the court may decline to charge that a less degree of diligence in looking out for stock is required while running through a field than while running through lands uninclosed. Central R. & B. Co. *v.* Summerford (Ga., July 13, 1891), 13 S. E. Rep. 588.

Effect of Stock Law on Degree of Diligence Required of Company.—Although the existence of a stock law is apparent and may be made material on the questions of ordinary and reasonable care and diligence in guarding against killing stock by the running of trains, yet a request to charge, in general terms, that a less degree of diligence is required in a county where that law prevails than a county where it does not, may be declined. Central R. & B. Co. *v.* Summerford (Ga., July 13, 1891), 13 S. E. Rep. 588.

Statutory Precautions Required When Obstruction is Seen on Track—Presumption of Negligence—Duty of Engineer.—Code, § 1144, provides that the engineer must, on perceiving any obstruction on the track of a railroad company, use all the means in his power known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train. Section 1147 provides that, when stock is killed or injured, the burden of

proof is on the company to show compliance with the statute. *Held*, that where, in an action for killing a cow, there was evidence that, when the engine was forty yards distant, the animal ran upon the track from behind an obstruction in a cut; that the engineer could not have seen her sooner; and that he could not then by any means have averted the collision—an instruction that "the burden was upon the defendant to show a compliance with the requirements of the statute as to reversing the engine and applying the brakes after discovering or seeing the cow on the track," was error, since, if the evidence was true, the engineer needed not to comply with the statute. Savannah & W. R. Co. *v.* Jarvis (Ala., Dec. 16, 1891), 10 So. Rep. 323.

Pleading—Sufficiency of Allegations of Negligence.—In the Indian Territory, a complaint alleging simply that defendant, while operating its railway through plaintiff's pasture, negligently killed his stock, and that the stock was killed solely through defendant's inexcusable neglect, is sufficient to withstand a general demurrer, since, under Mansf. Dig. Ark, § 5065 (in force in the territory), a complaint will be treated as alleging every fact which can be implied from its averments by the most liberal intendment. Gulf C. & S. F. R. Co. *v.* Washington (C. C. A.), 49 Fed. Rep. 347.

KELVER

v.

NEW YORK, CHICAGO & ST. LOUIS R. CO.

(*126 New York, 365.*)

Killing Stock—Fencing Track—Parallel Tracks of Other Roads.—Under a statute imposing upon railroad companies the duty to fence their tracks except where such fence is unnecessary to prevent stock from going on the track from adjoining lands, and liability for the killing of cattle upon their tracks at a point where such fences are not constructed, a railroad company is not relieved from liability by the fact that, at the point where cattle were killed, its road was the center one of five parallel railroads, and that there was not sufficient room between it and the adjoining tracks to erect a fence without endangering human life.

APPEAL from Superior Court of Buffalo, General Term.

John G. Milburn, for appellant.

Simon Fleischmann, for respondent.

ANDREWS, J.—The forty-fourth section of the general railroad act of 1850 imposed upon every railroad company organized thereunder an absolute duty to erect and maintain fences on the sides of its road, and made the corporation liable for all injuries done by its "agents or engines" to cattle or other animals thereon until such fences shall have been made. This absolute duty was

Statutory provisions.

modified by § 8, chap. 282, Laws 1854, which was an act amending the Act of 1850, and which section substantially re-enacted section 44 of the original act, but added thereto this provision: "That no railroad corporation shall be required to fence the sides of its road, except where such fence is necessary to prevent cattle, sheep, and hogs from getting onto the track of the railroad from the lands adjoining the same."

Facts.

It is conceded that the defendant has never fenced its road, and that the plaintiff's cattle were killed on the track of the defendant, onto which they had strayed, by an engine running thereon. It appears that the defendant is one of five railroads running for a distance out of the city of Buffalo on five parallel tracks, separated from each other only so far as to permit the passage of trains on the respective roads. The defendant's tracks occupy a central position, there being the tracks of two other roads on each side of its tracks; those on the easterly side being the tracks of the Buffalo, Rochester & Pittsburg Railroad and of the Western New York & Pennsylvania Railroad. The exterior tracks on the easterly side of the defendant's tracks are those of the road first named, and the plaintiff's cattle strayed from a farm adjoining the tracks of that road onto those tracks; thence across the tracks of the Western New York & Pennsylvania Railroad, onto those of the defendant. Netiher of the roads mentioned had ever erected any fences on the sides of its road. There was no barrier to prevent cattle straying from the farm where the plaintiff's cattle were, across the intervening tracks, onto the tracks of the defendant. There were eight or more tracks east of those of the defendant. The Buffalo, Rochester & Pittsburg Company had its tracks and sidings, and also an engine-house, coal platforms, and other structures on its lands, but the way was otherwise open and unobstructed. The east rail of the east track of the defendant's road was seven feet distant from the west rail of the west track of the Western New York & Pennsylvania Railroad, and when trains are passing each other on the two tracks there is a space of only three feet between the cars.

Defendant's contention.

The defendant relies upon two grounds for the reversal of the judgment: *First*, that the cattle did not get onto the defendant's tracks from lands "adjoining the same," within the meaning of the statute; and, *second*, that the court erred in rejecting evidence that fences on the sides of the defendant's road would, by reason of the narrow space between its tracks and those of

the adjacent roads, constitute a dangerous obstruction, and imperil the lives of passengers, and of operatives employed about the cars and upon the tracks.

The first point was adjudicated against the defendant's contention in the case of Shepard *v.* Buffalo, N. Y. & E. R. Co., 35 N. Y. 641. In that case cattle had strayed from lands adjoining the track of the New York Central Railroad, upon and over the track of that road, and thence upon the track of the Erie road, immediately adjoining, and were there killed. Neither company had fenced its road. It was claimed that the primary duty to fence was upon the road whose tracks were next to the land from which the cattle strayed, and that the lands of the New York Central Railroad, from which the cattle came onto the defendant's road, being railroad lands, were not "adjoining lands" to those of the defendant, within the statute of 1854. The court overruled the contention, and while conceding that the purpose of the statute would have been attained if the New York Central Company had complied on its part with the law, nevertheless held that the defendant was not thereby excused, and, not having fenced its road, was liable for the value of the cattle.

Construction of statute—Adjoining lands.

The multiplication of railroads, and the difficulty, especially in large cities, of securing suitable and convenient approaches and outlets, makes it often desirable, and in some cases necessary, that different converging roads should be constructed for a distance on substantially parallel routes, adjacent to each other. If this condition of things had been in the mind of the legislature when the legislation in question was enacted, it is not improbable that the obligation to build fences in such cases would have been imposed exclusively upon the road occupying the exterior part of the territory upon which the several roads were constructed, or have imposed a joint obligation to fence on all the roads. This would apparently have satisfied the purpose of the statute. But the statute imposes a several obligation upon every company to fence its road, with the qualification that the duty to fence does not arise, where no fence is necessary to prevent cattle from reaching the track. If there is a natural or artificial barrier which bars the way, then, as there is no necessity for one, no fence is required. But the statute does not permit the company to exercise a discretion depending upon the improbability of cattle going upon the track where there is no barrier, natural or artificial, to prevent them, and under such circumstances it

Defendant not excused from fencing its road.

cannot be left to a jury to find whether the omission to fence was reasonably prudent or not. The case of Dolan *v.* Newburg, D. & C. R. Co., 120 N. Y. 571, 42 Am. & Eng. R. Cas. 611, proceeds upon special circumstances, and is not in conflict with the views herein expressed. In the present case there is nothing to limit or qualify the general duty to fence, or which justified the exercise of any discretion on the part of the defendant in protecting its road from the intrusion of cattle.

The evidence to show the danger to passengers and operators from the erection of fences was, we think, properly excluded. It is to be observed that the question is not whether a court would, in the actual situation, compel a specific performance by the defendant of its statutory duty. It may be conceded that it would refuse to enforce specifically the building of fences along the sides of the defendant's road as now located, if it should appear that by so doing human life would be endangered. But this, we conceive, is no answer to a civil action for damages resulting from the neglect to fence. The defendant for its own purposes, and by its own volition, has placed its tracks in such near proximity to the tracks of other roads that it cannot, as is claimed, perform its statutory duty without hazarding the safety of its passengers and others. It seeks to set up a situation which it itself has wrongfully created as an excuse for disregarding this duty. This it cannot do. If it had appeared that the Buffalo, Rochester & Pittsburg Railroad Company had erected and maintained a proper fence along the easterly side of its track, through or over which the cattle had nevertheless escaped onto the defendant's tracks, a different question would be presented. The question would then arise whether the defendant might not be entitled to treat the fence of the other corporation as its fence for the purposes of the statute. But this question is not presented. Following the language of the statute as interpreted by the decisions, we must hold that the action is maintained. It is for the legislature to change or modify the statute, if any change or modification is expedient. The judgment should be affirmed. All concur.

Obligation of Railroad Company to Fence Its Track Where It Runs Parallel with Other Roads.—The decision of the New York court of appeals in the above case appears to conflict with a recent case decided by the Connecticut supreme court of errors. The Connecticut statute provides that railroad companies shall fence their tracks, except at such points as the railroad commissioners shall adjudge unnecessary, and that in the event of a failure to do so, any person suffering damage by reason thereof shall have a cause of action. The court held that this statute did not require

a railroad company to fence its track at a place where it is located fifty feet distant from and parallel to the track of another company, although the commissioners had never adjudged that the fencing at that place was unnecessary; and the company was held not to be liable for injuries to a horse which came upon the track at that point. The court said: "The language (of the statute) would even include places where the railroad track intersects a public highway or other railroad tracks, or where it passes over rivers or bodies of water. Such results could not have been within the intent of the legislature. It is therefore our duty to discard a literal and adopt a rational construction." Gallagher *v.* New York & N. E. R. Co., 57 Conn. 442, 40 Am. & Eng. R. Cas. 197.

Duty of Company to Fence Track—Necessity for Instruction to Jury.—Since there is no statute requiring railroad companies to fence their tracks in the Indian territory, the court should, when requested, in an action for killing stock in such territory, charge the jury to that effect, in order to prevent misconception. Gulf C. & S. F. R. Co. *v.* Ellidge, (C. C. A.) 49 Fed. Rep. 356.

What Are Depot Grounds Where Company Is Not Required to Fence—Evidence.—In Plunkett *v.* Minneapolis S. M. & A. R. Co., 78 Wis. 222, it was held that depot grounds, where the statute does not require railroad companies to maintain fences, may properly be defined as "the place where passengers get on and off trains, and where goods are loaded and unloaded, and all ground necessary and convenient and actually used for such purpose by the public and the railroad company." An error in admitting improper evidence as to the limit of the depot grounds, in an action against a railroad company for an injury to cattle on its unfenced track, will be deemed immaterial, where the other evidence clearly shows that they did not extend to the place where the cattle entered upon the track. The court said: "The definitions of depot grounds, given by the courts, are various, and it is perhaps a little difficult to make a definition of practical application in all particulars. But the learned counsel of the appellant cites Fowler *v.* Farmers Loan & Trust Co., 21 Wis. 78, in which the definition is given as 'a place where passengers get on and off the cars, and where goods are loaded and unloaded, and all grounds necessary and convenient and actually used for these purposes.' It would seem that the court had copied this definition in the above instruction, as they are so near alike in language and scope, and so clearly sanction the instruction. The learned counsel of the respondent also cites this case as authority for the instruction. Where both parties so clearly agree as to the correctness of this instruction as sanctioned by this court that ought to be the end of the argument, but the learned counsel on both sides have continued the discussion, and cited numerous authorities. Other courts have sanctioned the above definition given by this court and in the instruction as follows: In Maghee *v.* Camden & A. R. Co. 45 N. Y. 520, 'the depot of the railroad company is where it is accustomed to receive, deposit, or deliver the goods and merchandise carried by it.' In State *v.* New Haven & Northampton Co., 37 Conn. 153, 'the depot is a place where the passengers are received and left, and where freight is deposited. It is a place of deposit.' Reference may be had to the briefs of counsel for many cases defining depot grounds, but as the instruction is sanctioned by this court, and sustained by the other authorities, any further citation of cases in this opinion is unnecessary. The grounds necessary or useful and used for the purposes of the freight and passenger business of the road, which includes all the business in which the public are interested, may properly be called 'depot grounds.' This would include the switching and making up of trains, and the use of sidetracks for the storing of cars, and the place where the public require open and free access to the road for the purposes of such business.

There is really no disagreement of the courts in respects to these essentials of depot grounds. Within the widest definition found in any case the highway mentioned is far outside of the depot grounds of Weyerhauser. The eastern end of the side or switch tracks is as far as they could extend for any possible public purpose of a depot. The testimony clearly warranted the jury in finding that the place where the oxen entered upon the track of the road was not within the depot grounds. The road should therefore have been fenced at that place, and a cattle guard constructed in the highway crossing."

What is Public Highway at Which Fences and Cattle Guards Must Be Maintained.—Where it is provided by statute that a road used as a public highway for more than twenty years shall be deemed public highway, a lane traveled by the public continuously for forty years comes within the statute. Accordingly, where a railroad crosses such land, the company is bound to maintain fences and cattle guards at such crossing. Louisville, N. A. & C. R. Co. *v.* Etzler, (Ind., Feb. 5, 1892), 30 N. E. Rep. 32.

Fence Between New Highway and Track—Agreement of Company And County Commissioners.—A railroad company, which has agreed with county commissioners to erect a fence along a new road to be opened alongside its track, in consideration that the old road crossing the track be abandoned, is not liable to a traveler upon the new road for injuries sustained by the absence of such a fence when the old road has not been abandoned. Elgin *v.* Baltimore & O. R. Co., (Md., March 24, 1891), 21 Atl. Rep. 688.

Failure of Company to Construct Cattle Guards—Landowner Compelled to Herd Cattle—Evidence—Value of Herding.—The plaintiffs' bill of particulars in a justice's court alleged, in detail, that the defendant railway company failed and refused to construct cattle guards on its line of railroad where the same entered and left the plaintiffs' fenced pasture land, and that the plaintiffs were compelled to herd their cattle to prevent them from straying from such pasture land. *Held*, that the bill of particulars is sufficient to withstand an objection made by the defendant to the introduction of any evidence under it, for the claimed reason that it did not state facts sufficient to constitute a cause of action. The court below did not err in permitting the plaintiffs to show that it was necessary to herd their cattle, and in permitting them to show the value of such herding by a witness who was not first shown to be an expert in such matters, where the only objection made to the evidence was that it was "incompetent, irrelevant and immaterial." The court below did not err, as against the railway company, in instructing the jury that the plaintiffs might recover for the value of the herding up to the value, but only up to the value, of the things belonging to themselves and others, which might have been injured by the cattle if they had been permitted to run at large, and which things the plaintiffs had the right to protect, or which they were under obligation to protect, from the depredations of their own cattle. Chicago, K. & N. R. Co. *v.* Behney, (Kan., Feb. 6, 1892), 28 Pac. Rep. 980.

Failure of Railroad to Construct One-Half of Boundary Fence—Pleading.—There being no common-law obligation for a railroad to build a fence along its line, but it being obliged by statute to build half of the fence after notice, as in the case of persons owning adjoining lands, damages cannot be recovered against a railroad for failure to construct a fence, though it has refused to do so after notice, where plaintiff does not aver a construction of, or offer to construct, his half of the fence. Hall *v.* Trustees of Cincinnati Southern R. Co. (Ky., Oct. 8, 1891), 17 S. W. Rep. 207.

Construction of Fence by Landowner—Recovery of Value from Railroad

Company.—Under the provisions of chapter 154 of the Laws of 1885, compelling railroad companies to fence their roads through lands inclosed with a lawful fence, before the owner of the lands can recover the value from a railroad company of a fence built by him in accordance with the provisions of the statute, he must prove that his lands, or a part thereof, which are claimed to be inclosed, have a lawful fence; that is, such a fence as is defined by the statute to be a legal or lawful fence. Missouri Pacific R. Co. *v.* Youngstrom, (Kan., Nov. 7, 1891), 27 Pac. Rep. 982.

Contract by Company to Fence—Duty and Liability Imposed By.—A contract by a railroad company to fence its track, through certain lands, imposes upon it the same duties and liabilities, with respect to the killing of stock, as would be imposed by a statute requiring the company to fence its track. Gulf C. & S. F. R. Co. *v.* Washington, (C. C. A.), 49 Fed. Rep. 347.

McCAULEY

v.

MONTANA CENTRAL R. CO.

(*Montana Supreme Court, January 25, 1892.*)

Killing Stock—Admission of Negligence—Taking Possession of Carcass of Animal.—If a claim agent of a railroad company, acting within the scope of his duties and with a knowledge of the circumstances, takes possession of the carcass of a cow killed by a railroad train, and orders the same sold for the benefit of the company, this constitutes, *prima facie*, an admission of the negligence of the company in killing the cow, under a statute providing that in case of injury to live stock through its negligence, the body of the animal shall belong to the railroad company, unless the owner shall elect to take the same, in whole or in part, for damages.

APPEAL from Jefferson District Court.

Henry G. McIntire, for appellant.

Adkinson & Miller, for respondent.

BLAKE, C. J.—This action was brought to recover damages for injuries to a cow, in the month of December, 1889, through the negligence of the agents and servants of the appellant, a railroad corporation. There is only one question for our consideration. At the conclusion of the evidence for the plaintiff "the defendant moved the court that plaintiff be nonsuited because he had introduced and offered no testimony tending to show any negligence on the part of the defendant." The motion was overruled, and, no evidence being introduced by the defendant, judgment was entered in favor of the plaintiff. All the testimony upon this point is given in the transcript. The plaint- **Case stated.**

iff testified that he was acquainted with W. B. Green; that he went to see him to settle for the cow; that Mr. Green was acting as claim agent, at the time, of the defendant; that Mr. Green "said he was on the train at the time, and ordered the cow killed, and he ordered the beef shipped to Helena to be sold for the benefit of the company. He said that he ordered it to be killed, or killed it himself, but as to which I can't say now. He said nothing more as to how the cow was killed, but that she had one leg broken, and he ordered it killed,—either killed it himself, or ordered it killed; that the train had knocked her off the track. * * * I was told that this cow was killed on the Montana Central road. Mr. Green told me that, and he also told me that he was on the train at the time."

This testimony concerning the conduct of Mr. Green can be easily understood by observing this section of the statutes

Statutory provision.

"In every case of the wounding and killing of any such cattle, or sheep, the price of the damages [for which] is fixed by this chapter, the body of such animal shall belong to such company, unless the owner thereof shall elect to take the same in lieu of said damages, or part thereof, within twenty-four hours after said wounding or killing, but in every other case the railway or railroad company may proceed to take care of and preserve the body of said animal; and it shall be the duty of said company to preserve the hide of such animal for at least thirty days after such killing, for inspection by said railroad or corporations, at the station-house nearest to the place where such killing occurred." Section 717, Comp. St., div. 5.

Green was upon the train which inflicted the injury upon the animal, and availed himself of the provisions of the law

Admission of negligence.

for the benefit of railroad companies when they are liable to be mulcted in damages for the killing of live stock. The action of this agent of the corporation, within the scope of his duties, and the receipt of the proceeds of the sale of the beef, are sufficient to establish a *prima facie* case of the admission of negligence against the defendant. It is conceded by the appellant that the respondent has the right to bring an action for the conversion of the animal, and therefore it is contended that the appropriate remedy has not been pursued. But this officer of the corporation was acting rightfully, under a statute which authorizes these proceedings, and hence there was no conversion of the property. His conduct, and that of the appellant, were admissions as potent as words, and were entitled to be weighed by the jury. It is ordered and adjudged that the judgment be affirmed.

HARWOOD, J., (*concurring.*)—The problem in this case is to find justly, and on sound principles of law, whether or not any acts or circumstances proved in the case fairly indicate, as a *prima facie* showing, that there was negligence on the part of appellant in committing the injury complained of. Appellant contends there is no such showing, while respondent insists that certain conduct of the appellant proved amounts to a *prima facie* admission that the injury to the animal happened in consequence of appellant's negligence in operating its railroad. Appellant is operating a railroad through open lands, upon which respondent has a right to pasture his domestic cattle. In order to determine the rights and liabilities of these parties in case of injury to any of such animals by the operating of the said railroad, the law provides (considering the statute, and the Bielenberg Case, 8 Mont. 271, 38 Am. & Eng. R. Cas. 275, together) that, in case any such animals should be killed or injured by the operation of said railroad with due care, *i. e.*, in case the injury or destruction occurred without any negligence on the part of appellant, its agent or employes, then it should be in no manner liable therefor; and it is further provided that, in case any such injury or destruction should happen through the negligence of appellant or its agents, then it should be liable to pay the owner of the animal injured the value thereof; but in that case appellant should have the animal so killed or injured, and the right to take it at once, on the happening of the event. With these legal conditions existing, it happened that a train passing over said road, through said land, was run upon and broke the leg of a certain cow belonging to respondent; and, appellant being present, with its agents and employes, and its stock or claim agent, charged with the duty of looking after claims for injury to stock in such cases, and presumably knowing all the circumstances attending such injury, appellant's claim agent immediately proceeded to take, or cause to be taken, said injured cow, killed it, sold it, and took the proceeds for the benefit of the railroad company.

Now, when the terms and conditions of the law are considered in reference to the circumstances shown and the conduct of appellant in relation to said animal, would it be a violent presumption to conclude that appellant had by its voluntary conduct indicated, as a *prima facie* showing, that said animal was run upon and injured under such circumstances as to make it lawful for appellant to proceed to take the injured animal and treat it as its own? Did appellant indicate apparently, or *prima facie*, as it is said, by the conduct of its agents, that it had done something, considering its conduct in connec-

tion with the law, to authorize it to follow up the injury by taking the animal? The taking followed the injury as part of one transaction; and, if appellant's conduct is to be construed as indicating *prima facie* that circumstances had so happened as to give it the right to take the animal, the very essence of those circumstances was negligence in committing the first injury. Otherwise, when the injury happened, if without negligence, appellant could have gone its way, and left the owner of the animal to make the best he could of a misfortune for which appellant was in no wise responsible. Appellant is presumed to have done as it did knowing the law and the exact conditions of its liability, and its rights, if liable. If it is not reasonable to draw the presumption just proposed from the conduct of appellant, then some other construction is to be put upon its acts. Are we to presume that when appellant, without negligence, ran its train upon and injured the animal in question, and knowing consequently that it was without liability for the injury, and consequently was without right to take the injured animals, nevertheless, under those circumstances, appellant wantonly and unlawfully went outside of the course of its business, and, to add injury to injury, captured, butchered, and sold the animal, and pocketed the proceeds? Are we to presume that where the railroad company was clear of liability it unlawfully adopted this course of conduct? If there was no negligence on the part of the appellant, there was no liability; if there was no liability, it had no more right to take the crippled animal than any other person, and its taking was wrongful and unlawful; while, if the injury happened under circumstances of negligence on its part, it was liable for the injury, and it had a right to proceed as it did, and take the animal, and save what it could by assuming it. Here were two courses to pursue depending upon the very question whether or not negligence accompanied the injury. That was the very point which would order and shape and give course to appellant's conduct, provided it acted upon the knowledge it had as to the law and the facts, and desired to act lawfully. If there was negligence, it could lawfully take the animal. If there was no negligence, it could lawfully go its way with impunity. Are we to presume appellant took the wrong—the unlawful—course, and knowing all the circumstances attending the injury, and knowing that the facts were such that no liability ensued against it from what had happened, still the appellant captured and butchered said wounded animal, and disposed of it in the market, and took the proceeds? Such is not to be presumed. No such construction is to be put upon the acts of appellant in this matter, where its con-

duct, in another view, can be regarded as lawful, and done in good faith, simply to avail itself of its rights; and this view involves the tacit *prima facie* admission by appellant's conduct that there was negligence on its part in committing the injury complained of, which fixed its liability and gave it the corresponding right to take the animal. "The law presumes that all acts are done in good faith until there is evidence to the contrary." McCagg *v.* Heacock, 34 Ill. 476. Mr. Lawson, in his work on Presumptive Evidence, p. 93, states the familiar rule of law as follows: "A person who is shown to have done any act is presumed to have done it innocently and honestly, and not fraudulently, illegally, or wickedly;" and cites many cases establishing and illustrating that rule. I concur in affirming the judgment.

DE WITT, J., (*dissenting*).—It is conceded in this case that the cause of action set up in the complaint is the negligent killing of plaintiff's cow by the defendant in December, 1889. It is conceded that, under the decision in Bielenberg *v.* Montana Union R. Co., 8 Mont. 271, 38 Am. & Eng. R. Cas. 275, the plaintiff cannot recover, and has not a *prima facie* cause of action, unless he shows some evidence of negligence by the defendant. It is conceded that there is not one word in the evidence tending to show any negligence on the part of the defendant. But the judgment is affirmed, and this court holds that *prima facie* proof of negligence was made by virtue of an admission of negligence, in that defendant took possession of the carcass of the cow killed; and this admission is construed out of the statute, (section 717, Comp. St. div. 5.) That section is part of the act of February 23, 1881. The first section of that act, which has become section 713 of the Compiled Statutes, provided, to state it briefly, that a railroad corporation that, in the operation of its railroad, killed an animal, should be liable to the owner for the value of the same, regardless of whether the killing was by the negligence of the railroad corporation. In other words, the railroad corporation was an insurer of the safety of all animals going upon its track. The statute was thus more tender of the safety of the domestic, than of human, animals. That section of the law, as a matter of course, fell before the first attack in this court. Bielenberg Case. Therefore when the animal, the value of which is the subject of this action, was killed, the defendant was liable only in case its negligence was the cause of the killing. In accordance with this established view of the law, the plaintiff brought his action for the negligent killing, and he wholly failed in his proof.

But did defendant admit its negligence by the act of taking the carcass? The act of the legislature of March 10, 1887, (Comp. St. §§ 720–729), was upon the same subject-matter as the act of February 23, 1881, and they are all put together in the Compilation as chapter 37. In the latter act we find a section, which is 726 of the Compilation, as follows: "In all cases where any corporation, association, company, person, or persons shall be liable to the owners of any animals killed as provided in this act, they shall be authorized to skin the same, and shall be entitled to the carcass and hide thereof, unless the owner or owners thereof shall claim the same, in which event the amount of the value thereof shall be deducted from the amount of damages which would otherwise be due." Whether section 726 repeals section 717 it is not necessary to decide. If 717 is repealed, the way is very clear; but, in any event, if section 717 remains, it and 726 are *in pari materia*, and must be construed together. Under chapter 37, the railroad company was not liable for all animals that it killed in the operation of its road. Section 716 provides: "If the owner of any stock shall drive any stock on the line of the track of any such company or corporation, with intent to injure such company or corporation, and such stock shall be killed or injured, such owner shall not receive any damage from such railroad company or corporation therefor. * * *" Therefore, under the acts of the legislature that became chapter 37, the railroad company was liable for all animals killed by it, except those driven onto the track by the owner with intent to injure the railroad company. Now, we know for what killings the company was liable "as provided in the act;" and, when they are so liable "as provided in the act," they are to own the carcass of the animal killed. I do not understand that it is claimed that the company owns the carcass, except by virtue of the provisions of this act. Thus the taking of the carcass by the company, if it is an admission of anything, is an admission of what? It is an admission that they are liable "as provided in the act," section 726. What does liability "as provided in the act" mean? What are the elements of such liability "as provided in the act?" Mark, that no other liability is mentioned except that "provided in the act." No common-law liability by virtue of negligence is contemplated. I should suppose that the elements of such liability "as provided in the act" would be about as follows: (1) The venue; (2) ownership by plaintiff; (3) a value; (4) that the animal was not driven onto the track by the owner, although let it be noted that I do not speak of this element as one to be proved by the owner,

or alleged in his complaint, or a matter in question, unless raised by an issue; and (5) that the animal was killed simply, with no allegation or proof of negligence.

Now, concede that the taking of the carcass admits the liability of the company "as provided by the act," and that it admits all the elements of liability "as provided by the act." Then it admits all the elements of liability as above noted. But liability "as provided by the act" does not constitute legal liability; for, under the Bielenberg decision, to constitute liability there must be negligence. So that, when we concede that the taking of the carcass admits liability "as provided by the act," that taking does not admit any legal liability; for the liability under the act is not a legal liability, for it omits the vital element of legal liability, to wit, negligence. Therefore the taking of the carcass does not admit any negligence. So, by applying the provisions of the act of the legislature to the conduct of Claim Agent Green in taking the carcass of the animal, the most that the railroad company is made to admit, that is of interest in this contention, is only that the company killed the cow. The killing alone is not *prima facie* evidence of negligence, in the absence of a special statute making it so, as was the law in this state when the alleged cause of action arose. Bielenberg Case, and cases cited therein. The views that I express are, of course, independent of the legislation of March 2, 1891, as this killing occurred in 1889.

I am of opinion that the motion for a nonsuit should have been granted, and for that reason the judgment should be reversed.

Killing Stock—Disposition of Carcass of Dead Animal.—See Dow *v.* King, and note, (Ark.) 40 Am. & Eng. R. Cas. 233.

Damages for Killing or Injuring Animals.

Measure of Damages for Injury to Mules at Crossing—Instruction.—In an action for injuries to plaintiff's mules and wagon caused by collision with defendant's train, an instruction that the measure of damages is the difference in the value of the mules before and after the injury occurred, and any damage on account of loss of time of the mules, is not prejudicial to defendant, where it does not appear that the jury added any damage on account of loss of time of the mules. East Tennessee, V. & C. R. Co., *v.* Warmack, 86 Ga. 351.

Damages for Caring for and Treating Injured Cattle.—In an action for injuries to live stock, where the complaint alleges that the plaintiff was put to expense in caring for and trying to cure the injured cattle, and damages are demanded therefor, evidence is admissible, and instructions may properly be given, as to the cost of such care. Hyer *v.* Chamberlain, 46 Fed. Rep. 341.

Interest on Value of Animal.—In an action against a railroad company to recover damages for the negligent killing of a horse, run over by one of defendant's trains, the plaintiff is entitled to legal interest on the

value of the horse from the time of instituting the suit. Woodland *v.* Union Pacific R. Co., (Utah, April 2, 1891) 26 Pac. Rep. 298.

Value of Cattle Injured—Expert Testimony.—In an action for injury to cattle, the plaintiff, who testifies that he has bought and sold cattle for twenty years, may properly be permitted to testify as to the value of the cattle injured. Hyer *v.* Chamberlain, 46 Fed. Rep. 341.

A witness who knew the animal killed (a thorough-bred bull), his breed and peculiar merits, may testify to its value, although he may not be an expert and although his opinion is not based upon actual sales at or near the place. Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279.

Discrediting Plaintiff's Evidence as to Value of Animal—Assessment List.—In Fordyce *v.* Hardin, 54 Ark. 554, which was an action to recover damages for stock killed on defendant's track, it was held to be competent for the defendant to discredit the evidence of the plaintiff as to the value of the animal by introducing his assessment list, recently signed and verified by him, showing that the animal was of much less value than testified by him.

MCMASTER

v.

MONTANA UNION R. CO.

(*Montana Supreme Court, March 28, 1892.*)

Killing Stock—Fencing Track Where It Is Not Required—Negligence.—Where there is no law requiring a railroad company to fence its right of way, an owner of horses cannot rely upon any such duty on the part of the railroad company, nor rely upon the fact that the right of way was not sufficiently enclosed, so as to involve the company in liability for killing his stock, although it appears that the company had erected a fence but allowed the gates to be down so that the stock came upon the track.

Negligence of Company in Keeping Gates Closed Where Fence Is not Required.—Finding of Jury.—In an action for killing stock the jury found specially that the defendant company was negligent in not keeping the gates in its right of way fence closed and locked. The company was not obliged by law or contract to fence a track, but had built and maintained a fence at the place in question. Evidence was introduced by both sides in reference to this fence and the gates therein, without objection by either party. *Held*, that, under the circumstances, the court could not say that the finding of the jury was unreasonable and not founded upon evidence; *held, also*, that defendant's objection that no foundation was laid in the pleadings for the introduction of such evidence could not be sustained on appeal.

Negligence of Engineer—Failure to Avoid Injury—Evidence as to Weather—Instruction.—In an action to recover damages for the killing of stock by a railroad train, the evidence was conflicting as to whether the weather, at the time, was thick or clear, It appeared that the engineer neither sounded alarms nor applied brakes. *Held*, that it was proper to instruct the jury that it was "the duty of the engineer to keep a look-out for obstructions on the track, and to use all appliances at his command to avoid accident; that, if he failed to see an animal when he should see it and

thereby injures it, or, if seeing it, he does not use the appliances at his command to avoid injuring it, then the company is liable."

Contributory Negligence—Grazing Horses on Public Domain.—An owner of horses is not guilty of negligence which contributes to their death owing to a locomotive colliding with them on a railroad track, by turning them out to graze on the public domain in the vicinity of his ranch.

DEWITT, J, dissenting.

APPEAL from Deer Lodge District Court.

J. S. Shropshire, for appellant.

Theodore Brantley and *W. H. Trippet*, for respondent.

HARWOOD, J.—Action to recover damages for the alleged killing of four head of horses by the negligent and careless running of an engine and cars against and over them by defendant's agent and servants, in the operation of its railroad. Defendant answered plaintiff's complaint, not denying the killing of said animals, as alleged, by the running of defendant's engine and cars against and upon them, but denying that the injury happened through the negligent or careless conduct of defendent or its agents or employes in the operation of its railroad. And for a further defense defendant alleged that such injury happened through plaintiff's own carelessness, which contributed thereto. Upon these two points of issue, as we are informed by appellant's brief, the cause was tried. The jury returned their verdict in favor of plaintiff, assessing damages in the sum of $700. Defendant moved for a new trial, which motion was overruled, and appeal was taken.

Case stated.

The main proposition to be considered upon this appeal is whether or not the verdict is supported by sufficient evidence. Appellant contends that it appears from the evidence that the killing of said animals happened through unavoidable accident, without negligence on the part of appellant; or, as appellant's counsel states the proposition, "if defendant was in the exercise of ordinary care, and the killing of the animals resulted notwithstanding, then there is no liability;" and appellant contends that the evidence shows the state of facts involved in this premise. On the other hand, respondent insists that the verdict is supported by the evidence, which he asserts shows negligence and carelessness attending the killing of the animals in question, and that respondent in no way contributed thereto.

Question presented.

It appears that the killing of the animals in question happened near a place called "Kohr's Siding," on the line of defendant's railroad, in Deer Lodge county. Plaintiff resides about five miles distant from that place. The horses in question were turned out by plaint-

Evidence reviewed.

iff to graze upon the commons in the vicinity of his ranch; and between 2 and 4 o'clock on the morning of September 24, 1890, they were killed at the point aforesaid, by being struck by an engine and train of cars running over defendant's railroad. It appears to be conceded that said stock went upon defendant's railroad track without the fault or negligence of the plaintiff, (leaving out of consideration now the point made by appellant that the turning of said stock loose upon the commons amounted to contributory negligence on the part of plaintiff). The evidence shows that the railroad company had inclosed its right of way at the place in question by a fence; but it is also shown that at said place the lines of said fence were severed by gateways, and the evidence seems to be quite conclusive that such gates were broken down, and lying on the ground, or at least open so as to admit of stock passing freely through the fence upon said railroad track, at the time in question. Appellant insists that such gates were opened or broken down by others than its agents, and without its knowledge or permission; but it is not contended that plaintiff was in any way guilty of opening said gates, or carelessly leaving the same open. The testimony of plaintiff's witnesses tends to show that said gateways were, and had been for some time prior to the killing of said animals, left open. The testimony of defendant's section foreman is to the effect that for some time prior to the killing of said animals said gates were found open almost every morning, and were often closed by the sectionmen of defendant, and that said gates were found open on the morning after the killing of said stock.

The jury was asked by defendant to return special findings, and, among others, it was asked to find by what act or default defendant was negligent in killing said animals, if such killing was found by the jury to be attributable to the carelessness or negligence of defendant. In answer to this the jury stated, among other things, that defendant was negligent in not keeping said gates closed and locked. This finding is complained of as unreasonable, and not founded upon evidence. There being no law requiring defendant to fence its right of way sufficiently to keep stock from going thereon, defendant's view of the case is no doubt correct in assuming that plaintiff could not rely upon any such duty on the part of defendant, nor rely upon the fact that said railroad right of way was not inclosed, to involve defendant in liability for killing the stock in question. There was, however, much evidence introduced in reference to said fence, and

Defendant's negligence in keeping gates closed.

without objection by either party. Plaintiff does not contend that it was the duty of defendant to keep its right of way inclosed so as to prevent stock from going thereon, nor that, by reason of the absence of such inclosure, plaintiff could recover for the injury alleged. But it seems that defendant relied to some extent upon the fact of having constructed the fence inclosing its right of way as evidence of due care on its part in the attempt to keep stock from going thereon, and evidence was introduced as to the construction and keeping in repair of such fence by defendant. As against such evidence, plaintiff introduced testimony tending to show the condition of the gateways as above mentioned. This evidence tended to present to the minds of the jury a state of facts by which it was apparent that when animals came along to such gateways they could freely pass in and stray along the railroad track, and, having passed beyond the gateways, were then fenced in close to said track, so that they could not retreat to the open country on the approach of a train. Considering that this circumstance may have increased the danger to stock, as compared to no fence at all, and considering the further fact, shown by the testimony of defendant's witnesses, that after killing the stock in question defendant made and enforced a rule to the effect that, if said gates were not kept closed and locked by those who had the privilege of using the same, the railroad company would fasten said gates as stationery parts of the fence; and that this rule had the effect of keeping said gateways closed ever since the killing of said stock. Considering further, that, if the conditions were such that said gates could not be kept closed, then open crossings over defendant's right of way, with the usual "cattle-guards," to prevent stock from passing upon defendant's railroad, within the inclosure, could be provided, if necessary; and considering, in reference to what would be the exercise of due care under the circumstances, whether the arrangement last mentioned would not be less dangerous than that described as existing, and that the fact said gates being often left open was known to defendant's agents and employes,—considering these circumstances shown to the jury, we cannot say that its special finding, above mentioned, is unreasonable or groundless in its premise.

Plaintiff was in no way responsible for the existence or continuance of those conditions respecting said inclosure; and therein the case at bar is entirely unlike the case of Evansville & T. H. R. Co. *v.* Mosier (Ind.), 35 Am. & Eng. R. Cas. 196, cited by appellant, in which the gateways had been

put in for the use of the owner of an adjoining pasture, and it was held that such owner, "for whose benefit a private crossing is maintained, and who is supposed to be fully cognizant of the condition of the gate, and the use to which it is put, must, therefore, as between himself and the company, see to it that the gate is kept in proper condition, and that it is kept closed." We should unhesitatingly hold the same view in a proper case.

The case of Louisville, N. A. & C. R. Co. *v.* Etzler, (Ind. Sup.), 40 Am. & Eng. R. Cas. 205, cited also by appellant, was determined under a statute, as appears by the statement, which provided that "owners of land separated by a railroad may of right maintain crossings over such railroad, and impose upon the owner the duty of repairing and keeping up gates thereto, and that railway companies, in the absence of negligence, shall not be liable for injuring and killing stock at such farm crossings;" and it was held that under said statute a railroad company was not liable for injury to stock entering upon the track at such points, in the absence of negligence on the part of the company or its employes; and there was no negligence charged in that case.

Plaintiff, however, does not rest his case altogether upon the circumstances shown to exist in reference to said fence and gateways, but appears to have brought the same to view as circumstances bearing on the case, as against the proposition of defendant that it had "maintained a good and sufficient fence on both sides of its track, although it was not required to do so by law;" and, as before observed, the evidence concerning said fence, produced by each party, was introduced without objection from either. For this reason we cannot sustain the proposition of appellant's counsel that no foundation was laid in the pleadings for the introduction of such evidence.

Passing to the other branch of the case, the jury found also that there was negligence on the part of appellant's engineer of the passenger train, in that he made no effort to stop said train before striking plaintiff's horses. Appellant insists that the evidence shows that at the time and place of killing said animals the condition of the weather and the darkness was such that defendant's agents and employes could not, by the exercise of ordinary care and diligence, have seen such stock on the right of way in time to avoid striking the same. It was shown that two trains passed over defendant's road during the night in question,—a passenger and a freight train,—either one or both of which may

Sufficiency of evidence to support verdict.

have struck some of said injured animals. As to the freight train, it is shown by the testimony of the engineer and fireman who accompanied that train that as it passed along the place in question said train struck one animal, and to the best of their knowledge, only one, which animal was shown not to have been one of plaintiff's horses. The testimony of said witnesses is to the effect that said freight train was running slowly as it passed said place where plaintiff's horses were killed, namely, at the rate of about ten miles per hour; that they observed an animal on the track, lodged in the cross-ties over a culvert; that the brakes were applied, and the power of the engine reversed, and said train brought to a stop just as the engine reached and ran partly upon said animal; that they saw other horses running away from the track, but they stated to the best of their knowledge said train struck no other animal. This testimony, in view of the fact that said train was proceeding slowly, and came to a stop at said place, would seem to come from witnesses who had quite favorable opportunity to observe what happened, and, it having been shown that the animal struck by the train was not one of plaintiff's horses, this testimony tends to show that the killing of plaintiff's horses happened by some other means. The passenger train in question was run from Butte northward to Garrison, during the night in question, and passed by Kohr's siding between 3 and 4 o'clock of the morning in question. The testimony of the engineer and fireman who accompanied said passenger train is to the effect that when said train passed Kohr's siding it was running at the rate of thirty-five or forty miles per hour; that, as this train passed said place, two horses were struck by it, and thrown off the track, and that other animals might have been struck by said train; that the animals struck were not observed in time to avoid running upon them, because the darkness was increased by fog or mist in the atmosphere at the time and place, and for that reason the engineer and fireman were unable to see as far as usual in front of the train; that, had the weather been clear, the engineer could have seen seven or eight car-lengths in front of his engine, and with these conditions, and the exercise of care, he could have seen said animals, and frightened them from the track by sounding the whistle, and avoided striking them; but because the night was stormy, and rain or mist was falling, and fog prevailing, the animals were not observed in time to sound a whistle before they were struck and passed, and therefore no whistle was sounded, or other alarm attempted. Other testimony was also introduced by defendant to the effect that the weather was

stormy and rain or mist was falling, and fog prevailing, at the time in question. Testimony was also introduced by defendant that there was some curvature of the railroad track at the place in question, but it is not shown by such testimony that the view of the engineer is obstructed by reason of such curvature. The testimony introduced by the plaintiff is to the effect that such curvature is slight, and, notwithstanding the same, the track lies in plain and unobstructed view approaching from either direction to the place where said animals were killed. Plaintiff introduced testimony tending to prove that early on the morning following the killing of said animals there were no visible signs of rain or mist having fallen during the night previous; there being no dampness then visible on the ground, vegetation, or other objects, at that place. Plaintiff produced a witness, who testified that he rode from Butte on said passenger train, on the morning in question, and left said train at Deer Lodge, about four miles from Kohr's siding. This witness testified that he observed the weather particularly at that time, as he left the train, and walked towards his home, and that it was clear; that said train passed Kohr's siding between 3 and 4 o'clock; that the weather was not stormy, and it was not dark, nor was any fog prevailing when he left said train at Deer Lodge; that he observed the weather particularly when he left the train at Deer Lodge; that he was unable to state positively the state of the weather at Kohr's siding, but could state that the weather was clear a short distance from there. Plaintiff also introduced a report in writing, made by Smith, the engineer of said freight train, which passed along by Kohr's siding about 2 o'clock on the same night in which said Smith reported the striking of the horse found over the culvert, and in which report he stated that the weather was clear at the time and place of striking said animal. Said Smith testified at the trial, however, and in his testimony stated that the weather was "stormy, rainy, and misty" at the time said freight train passed Kohr's siding. McDuffy, the fireman on the engine of the freight train, in describing the condition of the weather at Kohr's siding when said freight train passed that place, stated that "there was a slight fog that would hinder your sight to a slight extent. It was not so very dense;" and in another part of his testimony, he says of the weather at the time, "There was a slight mist at Kohr's siding, as we passed there."

Plaintiff's horses were found lying beside the track, bearing the appearance of having been struck by a passing train;

and the position which these animals occupied, as respecting one another, when found, was shown to be as follows: Proceeding northward in the same direction in which said passenger train was running, the distance from where the first animal was found to the last was shown to be about 800 feet; the distance between the first and second being more than 500 feet. It is clearly shown what might have been done, by the exercise of ordinary care, towards preventing the destruction of said animals, if the weather was clear: and from these facts it appears that, in case the weather was clear, it is very likely the destruction could have been prevented by the exercise of due care. The testimony of the engineer and fireman accompanying said passenger train is to that effect; that said stock was up and moving, and that no alarm was sounded, and no effort made to stop or reduce the speed of the train. The evidence is conflicting as to the state of the weather at the time and place in question. The jury had before it the testimony of Patterson, who rode on said passenger train from Butte to Deer Lodge, which was to the effect that the weather was clear a short distance from the particular place where said animals were killed, and that it was not dark at the time, being about half past 3 o'clock of a September morning. There is no dispute about the time said train passed Kohr's siding. The report of the engineer of the freight train, which passed the place about the hour of 2 o'clock of the same night, was to the effect that the weather was clear at said place and time. This report was made immediately after the occurrence, and Engineer Smith, in his testimony, makes no explanation as to his having willfully mis-stated the condition of the weather in said report, or as to his having been mistaken in such statement. The report was made to the superintendent, was a formal statement of the conditions and circumstances attending his striking the animal in the culvert, and the question as to the state of the weather was distinctly asked, and the answer was set down. The testimony of the other witnesses was to the effect that early on the following morning there was no indication of rain or moisture having fallen during the night previous. Some of appellant's witnesses testified that a fog prevailed in spots, or "banks of fog," in low places, and that one of the alleged "banks of fog" prevailed where said animals were killed at the time of striking them. Counsel for appellant insists that the weather may have been clear a short distance away, and nevertheless foggy at the time and place said animals were killed. If this condition was in fact true, (although defendant's witnesses are not in harmony on that point,) it is then made to appear by the theory of appel-

lant's counsel that the parties in charge of said passenger train ran the same through a mere "bank of fog," without the precaution of sounding a whistle, at the same high rate of speed which might be proper if the view was clear,—at such a rate of speed that there was no escape for stock which happened to be upon the track, although such stock was moving when the train approached,—so fast that there was no time to even sound a whistle before the destruction was accomplished and passed by. The jury did not adopt the theory of appellant, and investigation of the evidence shows to us that there is testimony tending to lead to a different conclusion. We cannot, therefore, sustain the assignment that there is no evidence to support the verdict.

Appellant requested the court "to charge the jury that the testimony as to the circumstances of the killing of said animals was uncontradicted; that it was to the effect that the killing was an unavoidable accident; and that it failed to show negligence on the part of the trainmen; and that the jury should so find." The court refused to so instruct the jury, and appellant assigns such refusal as error. This request is based on the theory of the case and the showing of the evidence contended for by appellant, which we have been unable to find borne out by our investigations thereof, and therefore must conclude that the court committed no error in such refusal. The court gave the jury an instruction to the effect that it was the "duty of the engineer to keep a lookout for obstructions on the track, and to use all appliances at his command to avoid accident; that, if he failed to see an animal when he should see it, and thereby injures it, or if, seeing it, he does not use the appliances at his command to avoid injuring it, then the company is liable, unless it appears from the circumstances surrounding the case that the use of these means to stop the train would injure the lives of the passengers." Appellant complains that, "while such instructions may state the law correctly as a general rule, it certainly is too broad when taken in connection with the particular circumstances attending this case." We think this and the other instruction complained of by appellant fall under the same observations which we have made as to the refusal of the court to give the instruction requested, the complaint being based on his view of the evidence, which we have been unable to adopt.

Negligence of engineer—Instruction.

Appellant argues that respondent committed an act amounting to negligence which contributed to the destruction of said horses by turning them out to graze on the public domain in the vicinity of his ranch. We cannot concur in this proposition. Stock raising

Contributory negligence.

by utilizing the vast open ranges of this country, is, and has been since its settlement, one of the principal industries, which contributes to the prosperity of the common carrier as well as to the individual citizen. Numerous statutes have been passed from time to time during the history of Montana regulating the industry of stock raising, and clearly recognizing and sanctioning the matter of allowing stock to graze on the public domain as proper and lawful. The whole theory of the general legislation of this state is against the proposition advanced by appellant's counsel.

It is our opinion that the judgment ought to be affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

DE WITT, J., (*dissenting.*)—It is claimed that negligence by defendant is shown in two respects:

1. In not keeping the gates mentioned, closed and locked. In the complaint the negligence alleged is as follows: "That the said defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed said locomotive and cars on the said 23d day of September, A. D. 1890, that the same ran against and over the said horses of the said plaintiff, and killed and destroyed the same." This is denied by the answer. Negligence in leaving the gates open or unlocked is not mentioned in any pleading in the case. It is not the cause of action set up in the complaint. Defendant was summoned to court to answer for damages alleged to have been caused by operating its locomotive and cars. The jury found that it was negligent in this respect. But of this hereafter. They also found that the defendant was negligent in a wholly different matter, *i. e.*, in leaving some gates open and unlocked. The respondent's counsel recognized that the jury had gone outside of the case, and found damages for an act that plaintiff had not complained of in his pleading, and had not made his cause of action. Counsel, therefore, on his argument on the appeal stated that he abandoned any claim that his verdict should be sustained by virtue of the finding of negligence as to the gates, or the evidence in that behalf. Why, under such circumstances, should the matter of the gates be treated as in the case? The defendant was under no obligation, by law or contract, to build or maintain a fence along its right of way. This action arose before the Act of the last session of the legislature. It seems, however, that it did build and maintain such a fence. It put in these gates at the request of and for the accommodation of the neighbors at this point, not for any use of its own. It would not seem that building the fence and putting in the gates was negligence.

The defendant did not use the gates, or, in using them, leave them open. They were opened and left open by some one other than the defendant. That person is not shown to be the one for whose acts the defendant was responsible. The defendant's servants frequently voluntarily closed the gates, when they found them open. Because they, without a duty upon them so to do, closed them whenever they found them open, was it negligence on their part that they did not always find them when they were opened by persons other than themselves? It seems to me not. But they were negligent in not keeping the gates locked and closed, it is held. If they locked them, and retained the key, the result would be the same as if there were no gates; and I do not understand that it is claimed that it was negligence to build the gates. If they hung the key on the fence, or provided every passer with a key, the result would be the same as if there were no locking.

But as to keeping the gates closed: The place was in the country, away from any town. If it was the company's duty to keep the gates closed, there was but one effectual method of performing this duty. That was to keep a servant at every gate along the line, (and the evidence shows that they were very numerous,) to close them after careless passers, who were strangers to the defendant. Is the defendant liable for such strangers' acts? If this be the law, the defendant must put a guard over its entire property to protect it from negligent acts of third persons, which negligent acts may result in injuries to others, and for which the defendant is to be held liable. I do not understand that such duty rests upon the defendant. The jury found that it did, to be sure; but respondent's counsel promptly abandoned any such ground in this court. In that I think that he was correct. I agree with him that in the matter of the gates no negligence was either pleaded or proved. In Sweeny *v.* Great Falls, & C. R. Co., 29 Pac. Rep. 16, (last term), the allegation of the complaint as to negligence was that plaintiff was working for defendant under defendant's car, and that defendant carelessly and negligently, and without any notice or warning to plaintiff, backed or ran an engine against said car, and set it in motion, and, while so in motion by reason of said careless and negligent act of defendant, the car ran over plaintiff, etc. After a careful examination of the evidence in that case, this court held that there was a failure of proof that the defendant moved the car without warning, as alleged, and that, therefore, the evidence was insufficient to support the verdict. So in the case at bar, the allegation of the complaint is the negligence in running the locomotive

and cars. Proof in reference to the gates does not tend to support the said allegation.

2. I will now examine the cause of action as alleged and relied upon by the plaintiff's attorney. The four horses were killed in the night between September 23 and 24, 1890. It may be taken as conceded that they were killed by defendant's passenger train No. 5, which passed Kohr's siding, the place of the accident, at 3:35 A. M. The horses did not get on the track or right of way of defendant through any negligence of defendant. It may be considered as conceded that they did not get there through any fault of plaintiff. Under these circumstances, what happened? Plaintiff's witnesses do not testify as to the facts at the time of the collision. For those facts we must go to the defendant's witnesses. The train came along, about its business, at 3:35 A. M. The track was near the river. The engineer testifies that he was in his position on the right side of the cab. That the track curved slightly to the left. He was running at thirty-five miles an hour, which was not a dangerous or unusual rate. He schedule time was thirty-five to forty miles an hour at that point. The headlight was burning. He saw one horse on his side, and the fireman saw one on his. The engineer thinks that he struck the horses on the curve. The night was dark and misty and foggy at the time and place of the accident. He could not possibly see to exceed two car-lengths, or sixty feet. The train was equipped with air-brakes, and the engineer had it under control. He saw the horses about sixty feet ahead of the engine, on the track. He was on the right side of the engine. The track curved slightly to the left. It is not in evidence that there has yet been invented any contrivance to make the rays of light travel through the atmosphere on a curve. That being the case, I am obliged to take it as true that the light from the headlight shone on right lines, and, if the curve went to the left, the track left the area of illumination of the light. Naturally the engineer's observation could not extend as far along the track as it would if the track were straight, so that the light would shine down it in a straight line. If it had been light and clear, the engineer says that he could have seen seven or eight car-lengths; and that, if he could have seen the horses ten car-lengths ahead, he could have slowed up sufficiently, and have alarmed the horses, so as to avoid striking them. Having but sixty feet of space, and running at thirty-five miles an hour, he could not stop or whistle or ring a bell; that is, he could not give his attention to stopping the train, and sounding alarms at once, in that distance, and at that rate. His first attention was given to applying

his air-brakes. The following is his language: "I did not blow the whistle, for the reason that I did not have time. I did not have time to ring the bell either. In an emergency, the first thing we do is to apply the air-brakes. That is where our safety lies. I did not have time to turn them. If I should have done anything, I should have applied my brakes. I got hold of them. I had my air on them just as I was going by, and I let it off when I saw that it was all safe." So it is testified, and it is not questioned, that the engineer did his duty in getting to his brakes. Then he was past the horses, the danger was over, the damage was done. There was then no occasion for the bell or the whistle; and, before undertaking to use the brakes, there was no opportunity to sound the whistle or bell. The fireman's testimony is corroborative of that of the engineer. This is all the direct evidence of facts at the time of the accident. If this evidence is true, no reasonable being can read it, and discover any negligence in the conduct of defendant. And, moreover, respondent's counsel does not undertake to claim that there is any evidence of negligence if this testimony is true. He takes another position, viz., that the engineer and fireman did not tell the truth as to the circumstances of the killing. He says that they were manufacturing a case. This is a grave charge. It can scarcely be indulged as a presumption or assumption in regard to any unimpeached witnesses. These witnesses are unimpeached by any direct testitimony. Respondent finds their impeachment in circumstances, and holds that the jury were the judges of the credibility, and that their conclusion is final.

Of course, circumstances may impeach a witness more conclusively than words. The circumstances which respondent calls to his aid are in two classes. I will examine them:

1. It was sought to impeach defendant's witnesses by evidence that the weather, instead of being misty and foggy, as the engineer and fireman testified, was clear. If this be true, much of the foundation of the defense is demolished, and defendant's main witnesses are impeached upon a very material point, and the jury were justified in ignoring their testimony, as they did. Let us see. Witness Ramsdell testifies that the weather was bright and clear at 9 or 10 o'clock of the morning of the 24th. Byron Wood says that the weather was smoky, but the sun was shining so as to cast a shadow on the afternoon of the 23rd and the morning of the 24th. That in the morning there was no evidence of rain having fallen in the night. He passed the night at Deer Lodge, four or five miles from Kohr's siding. He would not pretend to say how the weather was at the place

of the accident, as he was not there. He should think that daylight would show at 2 or 3 o'clock A. M. on September 24th. This was an impeaching witness. Possibly the value of his testimony may be to some extent gauged by his statement that daylight shows three or four hours before sunrise. J. H. Meyers came from Phillipsburg, 50 miles from the place of the accident, on the morning of the 24th, passing Kohr's siding at about 10 A. M. The weather was clear. Peter Patterson, a passenger on No. 5, left the train at Deer Lodge, about five miles before the train struck the horses. The weather was not stormy. He could not say that it was cloudy. Does not remember whether the stars were shining. There was no fog at Deer Lodge. He does not know how it was at Kohr's siding, four or five miles away, and later than the time of his observation. Joseph Smith was at Kohr's siding at 8 P. M. of the 23rd and at 7 A. M. the 24th. The weather was good, and no fog. Such is the evidence adduced to show that the defendant's witnesses falsified when they said that there was fog and mist at the place of the accident at 3:35 A. M. Not an impeaching witness testifies as to the weather at the time and place of the accident. They are as far away as 50 miles in distance and 10 hours in time. The one who gets the nearest in time—probably within 15 minutes—is 4 or 5 miles distant; and the witness nearest in place is several hours removed in time. The place of the accident was in the valley by the river. Is it not within the most ordinary knowledge that it could be perfectly true that mist and fog could hang over the railroad track, by the river, at such an hour as 3:35 A. M., and still, miles away, and hours later and earlier, the weather be clear? This is too plain to merit discussion or comment. There was not in this showing a *scintilla* of evidence tending to impeach the testimony of the engineer and fireman of train No. 5. There was no conflict of evidence as to the mist and fog at Kohr's siding at 3:35 A. M., and for a considerable period each side of that exact time. The evidence was all one way, and was with the defendant. But again, train No. 9 passed this point on the morning of the 24th, between 2 and 3 o'clock,—about an hour before the accident. The engineer and fireman of 9 testified on the trial that the weather was then foggy and misty. To impeach this engineer of train 9, a report of his was introduced in evidence, in which he reports the weather at that time as clear. Grant that his report was true, and that his testimony on the trial was false, and that he was successfully impeached. What did this amount to at most? Simply that there was not fog or mist at the place of the accident an hour earlier in the night than

the time of the accident. Can this be held as evidence that the fog and mist did not come up during the hour, and be present when train 5 appeared upon the scene? This would be indulging in meteorological presumptions unwarranted by any evidence in this case, or any experience of mankind. Again, granting that the engineer of No. 9 was impeached, does that impeach the engineer and fireman of No. 5? If so, that would be reforming the old maxim, so that it could be said of a collection of witnesses on one side of a case, *unus falsus, omnes falsi.* Again, grant that there was no evidence of rain in the morning: that does not tend to show that fog and mist were not present in the night, and which fled before the sun. The whole evidence seeking to contradict the alleged presence of fog and mist at the time and place of the accident has not the substantiality of a cobweb. There was absolutely nothing in it upon which a jury could find an impeachment of the credibility of defendant's witnesses.

2. As to the other circumstances of impeachment: Respondent argues that the places in which the horses were killed establish that the manner of their taking off was other than as detailed by the defendant's witnesses. He says that first one was killed; the second was killed at a point 543 feet further on; the next, 132 feet beyond; and the last, 125 feet further. That this fact shows that the engine chased the horses, taking them single handed, picking them off one by one, as it was able to reach and slaughter them, after the manner of the historical battle of the Horatii and the Curiatii. But what is the evidence that the horses were killed at these points? In the first place, not a witness testifies, nor a circumstance shows, that the horses were killed at these points by the train; and, in the second place, not one of the horses was killed by the train. At 9:30 A. M. of the 24th the section foreman found the horses, all crippled, in the ditch, and so badly hurt that they could not live, and he killed and buried them all. The measurements from which we take the above figures were made a week or ten days after the killing, and were to the places of their respective sepultures. It is not shown that they were buried where they were struck. It is not shown how far they were thrown by the terrific force that met them, nor how far they moved in their crippled condition between 3:35 and 9:30 A. M. They were all alive when the foreman found them. To hold that it appears that they were struck by the locomotive at the particular places where they were afterwards buried is, in the light of the facts, a pure assumption. So the whole fabric of impeachment dissolves. Defendant's witnesses are left uncontradicted, and their testimony shows that there was no negli-

gence of defendant in this accident. It seems to be considered in the majority opinion that it may have been negligence to run the train on card time through a bank of fog; but I supposed that the theory of the affirmance of this case was that the fog did not exist.

I am of opinion that the judgment should be reversed, and a new trial ordered.

Failure of Railroad Company to Fence According to Contract—Killing Stock—Pleading.—In an action for the negligent killing of stock, where the plaintiff relies upon the failure of the railroad company to fence its track according to a contract, that fact must be alleged in the complaint. Gulf C. & S. F. R. Co. *v.* Washington, (C. C. A.), 49 Fed. Rep. 347.

Defective Fence—Knowledge by Defendant of Defect.—In an action to recover damages for a horse alleged to have been killed by reason of a defective fence, where the allegation is that the fence, as originally constructed, was defective, no evidence of knowledge by the defendant of the defect is necessary. Morrison *v.* Burlington, C. R. & N. R. Co., (Iowa, Feb. 9, 1892), 51 N. W. Rep. 75.

Animals Running at Large—Defective Fence—Pleading.—A petition, which alleges that the plaintiff's horses were killed by reason of a defective gate in defendant's fence through which they escaped on to defendant's track, sufficiently alleges that they were running at large and were killed through want of a fence. Morrison *v.* Burlington, C. R. & N. R. Co., (Iowa, Feb. 9, 1892). 51 N. W. Rep. 75.

Failure of Company to Construct Cattle Guards—Proximate Cause of Loss of Cow.—The defendant railway company failed and neglected to construct or maintain cattle guards where its line of railroad entered and left an inclosed pasture. During the time of such neglect the owner of the pasture attempted to keep his stock from straying by herding the same. One day the herder left the stock to go to dinner. While absent, a cow strayed away, got into a creeek, and mired down. *Held*, if the creek was at a great distance from the pasture, or if the miring of the cow was something extraordinary, and not to be expected, and it could not be said that the neglect of the railway company was the proximate cause of the loss of the cow, the company would not be liable therefor. Chicago, K. & N. R. Co. *v.* Hotz, (Kan., Jan. 9, 1892), 28 Pac. Rep. 695.

ADAMS

v.

ATCHISON, TOPEKA & SANTA FE R. CO.

(*46 Kansas, 161.*)

Killing Stock—Fences—Gates at Farm Crossing—Negligence of Landowner.—A landowner whose farm is divided by a railroad is entitled to necessary crossings; and where the railroad company fences its track through his farm, and constructs gates in the fences at such crossings for the accommodation of the landowner or his tenant, the duty rests upon him to keep the gates closed, and, if he neglects to do so, and his animals pass through them upon the track and are killed, without the negligence of those operating the trains, the railroad company is not liable for the loss.

Animals on Premises of Third Person—Rights of Owner.—In such a case, where the animals of a third person jump into the inclosure, and are wrongfully upon the premises of such landowner, and then pass through the gate and are killed by a train, without the negligence of those in charge of the same, the owner of such trespassing animals is entitled to no greater rights than the landowner, and cannot recover from the company.

ERROR from Shawnee District Court.

J. M. Adams brought an action against the Atchison, Topeka & Sante Fe Railroad Company for the value of a mule, which, it is alleged, was killed by the engine and cars of the railroad company at a point on the road which was not inclosed by a good and lawful fence. The case was tried with a jury, which rendered a verdict in favor of the plaintiff, and assessed his damages at $125, and awarded $25 as attorney's fees. The jury also returned the following findings of fact in answer to special questions submitted to them by the defendant: "(1) Did not the animal of said plaintiff which was killed go from plaintiff's premises into Judge Carey's premises and from thence onto the right of way of defendant railroad company; and was it not in the nighttime? Answer. Yes. (2) Was not the fence between the plaintiff's land and Judge Carey's land, at the place where the animal in question went upon Judge Carey's land, in a defective condition? A. Yes. (3) How did the animal in question get from the plaintiff's land onto Judge Carey's land? A. By jumping the fence. (4) At the time of the accident, was not the defendant's road or right of way inclosed with a good and lawful fence, and a gate at the crossing to Judge Carey's land, good and sufficient to keep animals, such as mules, off from said right of way, if said gate were closed? A. Yes. (5) How did the animal in question get from plaintiff's premises onto the right of way or track of the railroad company? A. Through the open gate. (6) Was not the gate through which the animal in question is supposed to have gotten upon the right of way of defendant placed in the right-of-way fence separating Judge Carey's land from the railroad, and at a private crossing, and placed there to be used by Judge Carey and his tenants in crossing said right of way to different portions of his farm? A. Yes. (7) Who opened the gate, and let the same remain open, last prior to the escape of the animal through the same, prior to the accident? A. No evidence. (8) How long prior to said accident had said gate remained open? A. The larger portion of a week. (9) How was the animal killed, or what caused the accident? A. By the locomotive or cars of the defendant. (10) Was the defendant

guilty of culpable negligence causing the injury and the death of the animal in question? A. Yes. (11) If you answer the last question in the affirmative state in what such negligence, if any, consisted. A. In not using more diligence in keeping the gate shut. (12) Was said animal permitted to go upon Judge Carey's premises by leave or license of Judge Carey or his tenants? A. No evidence. (13) If you answer the last question in the affirmative, state when such leave or license was given, and by whom. A. No evidence. Upon a motion of the railroad company, the court rendered judgment in its favor on the special findings of the jury, and gave judgment in favor of the railroad company for its costs. The plaintiff complains of the ruling of the court in holding the special findings to be inconsistent with the general verdict, and in giving judgment thereon for the company.

H. H. Harris, for plaintiff in error.

Geo. R. Peck, *A. A. Hurd* and *Robert Dunlap*, for defendant in error.

JOHNSTON, J.—The railroad company is liable for injuring or killing animals in the operation of its railroad at any points on its road which might be but are not fenced; but in the present case the railroad company had inclosed its road, at the place where the mule went upon the railway and was killed, with a good and lawful fence, fully sufficient to have prevented the mule from going upon the road. The railway ran through Carey's land, and the fences had been provided with gates, so that he and his tenants might pass from one portion of the farm to the other. The mule which was killed went through a gate which had been left open by some one, but it does not appear that the gate was opened by the railway employes. There was no evidence to show who left the gate open before the killing of the mule, but as the crossing and gates were provided for the accommodation of the land-owner, to be opened and closed at his convenience, the presumption, if any arises, would be that he or his tenants left it open.

Landowner's duty to keep gates closed.

It is the statutory duty of the railroad company to make and maintain sufficient and secure fences on either side of its railroad, and if it fails to erect a sufficient fence it is liable for animals killed, without proof of negligence on the part of the company. But where it has built a good and sufficient fence, with suitable and sufficient gates at the necessary crossings, it has performed its statutory duty, and nothing more is required except to maintain the inclosure. Where the railroad separates the different parts of the farm, the land-owner is entitled to drive-ways and farm crossings, in

order to enable him to go from one portion of the farm to another. (Kansas City & E. R. Co. *v.* Kregelo, 32 Kan. 608, 20 Am. & Eng. R. Cas. 241); and in order to utilize such crossings it is necessary that gates should be placed in the fences erected by the railroad company. Having provided gates at these crossings for the convenience of the land-owner, whose duty is it to keep the gates closed? He may open the gates as often as his convenience or necessities may demand. When he may desire to open and use the gates, or how long it may be necessary that they should remain open, the employes of the railroad company cannot know. As he may open and close them at his convenience, and without the knowledge of the company, he must, in the nature of things, be held responsible for the closing of the gates. The making of crossings and the placing of gates in the fences, so that the crossings may be used, is of no advantage to the company. They only increase the hazard and expense, and doubtless the company would prefer that the fences were without gates or openings. But the land-owner is entitled to necessary crossings, and cannot be deprived of their use by the company. As he may use them at will, in the absence of the employes of the railroad company, the gates are within his control, and the duty of keeping them closed must rest on him. To place upon the railroad company the responsibility of keeping the gates closed would require that an employe of the company should be stationed at every crossing to see that the land-owner performed the implied obligation resting upon him of closing a gate provided for his special benefit. This would be an impracticable and unreasonable burden, and was manifestly not within the contemplation of the legislature. If the fence provided by the railroad company was defective, or the gate and its fastenings insufficient, then a different rule would apply; but in this case the sufficiency of the fence constructed by the railroad company and the gate which it provided is not questioned. We think it is clearly the duty of the land-owner or his tenant to close the gates and keep them closed; and, if he neglect to do so, and his stock is killed or injured without the negligence of those operating the trains, the railroad company is not liable.

If the owner of the land, who is responsible for the closing of the gate, could not recover, does Adams, whose mule broke into Carey's inclosure, occupy any better position? It appears that the fence between plaintiff's land and Carey's was defective, and that the mule jumped into Carey's inclosure in the night-time, and went through the gate constructed for the use and accommodation of Carey upon the

Rights of owner of trespassing animals.

railroad track, and was killed. As his mule was a trespasser upon the Carey farm, and as the injury and loss occurred through his negligence and wrong, he is entitled to no greater rights than Carey would have, and is not entitled to recover. The case of Railroad Co. *v.* Adkins, 23 Ind. 340, is a case directly in point; and, although the authority of that case has been questioned in the later cases, we think it contains the better reasoning, and correctly decided the law. See, also, Harrington *v.* Chicago, R. I. & P. R. Co., 71 Mo. 384, 2 Am. & Eng. R. Cas. 652; Binicker *v.* Hannibal & St. Jo. R. Co., 83 Mo. 660; Hook *v.* Worcester & N. R. Co., 58 N. H. 251; Louisville, N. A. & C. R. Co. *v.* Etzler, 40 Am. & Eng. R. Cas. 205, 208, and 119 Ind. 39; Indianapolis, P. & C. R. Co. *v.* Shimer, 17 Ind. 295; Evansville & T. H. R. Co. *v.* Mosier, (Ind.) 35 Am. & Eng. R. Cas. 196. Union Pac. R. Co. *v.* Rollins, 5 Kan. 167; Pittsburgh, Ft. W. & C. R. Co. *v.* Methven, 21 Ohio St. 586; Eames *v.* Boston & W. R. Co., 96 Mass. 151.

We think the district court reached a correct conclusion, and therefore its judgment will be affirmed. All the justices concurring.

Contributory Negligence of Land-owner in Allowing Cattle to go on Track Through Open Gate.—See Wabash R. Co. *v.* Williamson (Ind.), 23 Am. & Eng. R. Cas. 203, note 206; Manwell *v.* Burlington C. R. & N. R. Co., (Iowa), 45 *Id.* 501; Bond *v.* Evansville, etc. R. Co. (Ind.), 23 *Id.* 200. Richardson *v.* Chicago & N. W. R. Co., (Wis.), 13 *Id.* 654.

Same—Rule where Cattle Belong to Third Person.—The rule laid down in the above case is not the rule adopted by the supreme court of Indiana. It is there held that while a railroad company may not be liable for killing stock belonging to one who has been permitted to erect a gate at a private crossing, for his own convenience, where the cattle entered upon the track through such open gate, yet it is liable in such cases for killing stock belonging to the owner of an adjoining farm which escaped into the field and adjoining track. Wabash R. Co. *v.* Williamson, (Ind.) 23 Am. & Eng. R. Cas. 203. The subject is discussed in the note to this case, page 206, where the cases are cited.

Contributory Negligence—Rounding up Sheep near Unfenced Track.—A herder of sheep is not guilty of such negligence as will relieve a railroad company of liability for killing them at a point where its track is unfenced. by taking his dog and leaving the sheep unattended for the remainder of the night, after he had rounded them up at a point more than a mile from the track and some of them had lain down apparently for the night. McCoy *v.* Southern Pacific R. Co. (Cal., May 20, 1891), 26 Pac. Rep. 629.

Contributory Negligence in Neglecting to Repair Fence—Statutory Privilege.—In an action against a railroad company for damages occasioned by cattle breaking through defective fences erected by defendant it is unnecessary for the plaintiff to show diligence in repairing such defects, even though the owner trespassed upon is authorized by statute to repair cattle-guards "at the expense of the railroad company if it fails to do so," for such statute is permissive only, and the owner may exercise the privilege at his option, without liability for contributory negligence if he fails

to do so. San Antonio & A. P. R. Co. v. Knœpfli, (Tex.. Nov. 17, 1891), 17 S. W. Rep. 1052.

Animal Killed by Construction Train Run by Contractors—Liability of Railroad Company.—Where a railroad company owns and operates a railroad, the construction of which is not entirely finished, and, while so operating the road, permits the contractor who constructed the road to run his construction train over the road so owned and operated by the company, and which at the time is unfenced, and a cow is killed by the construction train in consequence of the omission to inclose the road with a fence where it could have been fenced, an action may be maintained against the railroad company to enforce the statutory liability for the loss of the cow. Wichita & C. R. Co. v. Gibbs (Kan., Nov. 7, 1891), 27 Pac. Rep. 991.

Killing Stock Running at Large Contrary to Law.—Although it is provided by statute that every railroad company shall be liable in damages to the owner of any domestic animal killed or injured by its trains, a railroad company, not guilty of gross or wilful negligence, is not liable for killing a hog running at large contrary to the provisions of the statute. Denver & R. G. R. Co. v. Stewart (Colo. App., Dec. 3, 1891), 28 Pac. Rep. 658. The court said: "Under these circumstances we unhesitatingly declare that the motion for a non-suit should have been sustained. 'Where the owner of an animal is unable to show that, as against the railway, they were properly upon the track, or, in other words, that it was through the fault of the company that they were enabled to come upon the road, the company are not in general liable, unless, after they discovered the animals, they might, by the exercise of proper care and prudence, have prevented the injury.' Redf. R. R., § 126, and authorities cited. In the case of Denver & R. G. R. Co. v. Olsen, 4 Colo. 239, it was held that 'when a railroad company, in the exercise of its lawful business, in running a train through the streets of an incorporated city (which prohibted by ordinance certain animals running at large), killed an animal within the city limits, the animal coming within the prohibition of the ordinance, the company was liable only if the animal's death was the result of gross negligence on the part of the company's servants.' In the case of Witherell v. Milwaukee & St. P. R. Co., 24 Minn. 410, the court lays down this doctrine: If domestic animals are on the track of a railroad by the fault of the owner, such owner takes all reasonable risks of injury to them through passing trains; but, while the railroad company is not bound to presume that such animals will be upon the track, they are not authorized to injure them willfully or carelessly, but are bound to use reasonable care to avoid injuring them.

"In the case of Missouri Pac. R. Co. v. Dunham, 68 Tex. 232, 31 Am. & Eng. R. Cas. 530, it was held that railroad companies are entitled to presume that every person will comply with the law which forbids the owner to allow his animals to run at large. Hence they are excused from the exercise of such care as is exacted of them when animals are permitted to run at large. When there is no such law, they are liable for want of ordinary care; where there is such a law they are liable only for gross neglect. International & G. N. R. Co. v. Cocke, 64 Tex. 152, 23 Am. & Eng. R. Cas. 226; Pittsburg, C. & St. L. R. Co. v. Stuart, 71 Ind. 500; Cincinnati, H. & D. R. Co. v. Street, 50 Ind. 225. In the case of Jeffersonville, M. & I. R. Co. v. Adams, 43 Ind. 402, it was held that, if the owner of a cow knowingly permits her to run at large in the vicinity of a railroad which is not required by law to be fenced, and she strays upon the track and is killed, it not appearing that the killing is willfully done, the railroad company will not be liable though the owner may not have known that the railroad was completed. In the case at bar plaintiff proceeded upon

the theory that the act of the legislature (§ 2804, Gen. St. 1883) completely and fully covered his case. This section reads as follows: 'Every railroad or railway corporation or company operating any line of railroad or railway, or any branch thereof, within the limits of this state, which shall damage or kill any horse * * * or any other domestic animal, by running an engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof.' We are not compelled to fortify the assertion that this contention is unsound, because the decision of the supreme court in Denver & R. G. R. Co. *v.* Henderson, 10 Colo. 1, 31 Am. & Eng. R. Cas. 559, and Denver & R. G. R. Co. *v.* Olsen, *supra*, under the same statute, passed in 1877, fully and satisfactorily supports the conclusion here reached. We think the findings of the court were unwarranted, and that the court erred in overruling the motion for a non-suit, as well as in denying the defendant the right to introduce testimony in support of its answer. For the errors above recited the judgment will be reversed and the cause remanded for further proceedings: All concur."

When Cattle are Running at Large Within Meaning of Statute.—When the owner of a farm, by an arrangement with the occupant of an adjoining farm, allows his stock, with which is a bull more than a year old, to run across the line on the latter farm to graze, and both farms are otherwise inclosed, such bull is not running at large, within the meaning of the paragraph 6725, Kan. Gen. St. 1889. Missouri Pacific R. Co. *v.* Shumaker, 46 Kan. 769.

Stock Killed at Highway Crossing.—Where an action is brought against a railway company under chap. 94, Laws 1874 (pars. 1252-1257, Gen. St. 1889), for damages for stock killed at a place where the road is not inclosed with a good and lawful fence, the company may show as a defense, that the stock was killed at a crossing of the road used and traveled by the public as a highway, although not established or regularly laid out by the county authorities. Missouri Pacific R. Co. *v.* Kocher, 46 Kan. 272.

Killing Stock by Train Running Through Town at Excessive Speed—Existence of Municipality.—In Mississippi it is held that a railroad company is not relieved from liability for killing stock while running its train through a town at a greater rate of speed than that prescribed by statute because the municipality is twelve miles long, embraces but ten families, including the railroad section gang, the municipal authorities have held no session, the mayor has no docket, the town has no marshall, treasury, or funds, and no official bonds have been given by the officials. Bell *v.* Kansas City, M. &. B. R. Co. (Miss., May 25, 1891), 9 So. Rep. 289.

Evidence That Company Paid for Other Cattle Killed.—In an action against a railroad company for the negligent killing of a cow, evidence that the company had at different times paid other persons for cattle killed by its trains at the same place was irrelevant and inadmissible. Georgia R. & B. Co. *v.* Walker, 87 Ga. 204.

Notice of Injury to Stock—Tender by Company of Amount of Claim—Pleading.—In Hammans *v.* Chicago, R. I & P. R. Co., (Iowa, June 3, 1891), 48 N. W. Rep. 978, the plaintiff sued to recover double damages for stock killed and injured on defendant's railway. The answer of the defendant admitted the killing and injury to the stock, but alleged that before the expiration of thirty days allowed by statute for the payment of damages, after receiving notice of the injury, the defendant called at the plaintiff's residence to pay the amount of the claim, but did not find defendant at home, and so did not make the payment. The court held that this pleading was demurrable in failing to show a tender of the amount or due diligence in endeavoring to pay or tender the same within the statu-

tory period. The court said: "We see nothing in the language or effect of the statute providing double damages that should so change the rule as to require one who is injured in his property, before he can have the benefit of the statute, to establish headquarters for negotiations, and be there in readiness to receive what is actually due for thirty days or less, at the pleasure of his debtor. It must not be understood that we hold that a legal tender is the only means of placing a party entitled to payment in fault for non-payment, so as to avoid a claim for double damage; because the statute is a peculiar one, and its purpose should be clearly in view in determining such questions, so that, on the one hand, it shall not be an instrument of wrong or oppression, nor, on the other hand, should its purpose be avoided by a technical or unsound interpretation. If it should be said that reasonable diligence to make actual payment within the thirty days would defeat a claim for double damages, still the facts pleaded in this case do not rise to the dignity of such a rule. Defendant was at the residence of plaintiff once. Its purpose to pay was as to the plaintiff then and thereafter, to the commencement of the suit, a secret. Of all the ways open to inform the plaintiff of its willingness to pay, none were employed. In this case there was nothing to adjust as to amount, for the company concedes the amount claimed in the notice, and the notice limits the demand of the plaintiff. A simple note through the mail would likely have avoided this suit. The rule claimed by appellant is unreasonable, and cannot be sustained."

Injury to Stock in Indian Territory—Duty of Company and Owner of Stock.—Since there is no statute in the Indian Territory requiring either the owner of animals or railroad companies to erect fences, it is the duty of locomotive engineers to use reasonable care to discover stock upon the track and to avoid injuring them when discovered. The fact that the stock is in the territory in violation of law in no way affects the duty of the company to exercise care to avoid injuring them. Gulf C. & S. F. R. Co. *v.* Washington, (C. C. A.), 49 Fed. Rep. 347.

Action for Stock Killed—Sufficiency of Pleadings to Show County in Which Action Occurred.—In an action brought under the railroad stock law of 1874, it is essential to allege that the stock was killed or injured in the county in which the action was brought; but where the plaintiff alleges that the defendant company owned and operated the road over and across the plaintiff's premises, in Reno county, and that the defendant killed the plaintiff's cow "on the said railway track of said defendant, and by the operation of said railway," and no other railroad or railway track is mentioned in the pleadings except the one through the plaintiff's farm, the pleadings sufficiently show that the accident occurred in Reno county, where the action was brought. Wichita & C. R. Co. *v.* Gibbs, (Kan., Nov. 7, 1891), 27 Pac. Rep. 991.

Joinder of Causes of Action—Claim for Killing Animals and for Freight Paid.—In Rideout *v.* Milwaukee, L. S. & W. R. Co., (Wis., Feb. 2, 1892), 51 N. W. Rep. 439, the plaintiff's complaint stated two causes of action in separate counts. The first count charged that the company neglected to fence its track by reason whereof plaintiff's ox was killed; the second count was for the killing of a horse which the defendant undertook to transport, and in the claim of damages therefor was included an item for freight paid on such horse to the defendant. It was held that the claim for freight arose *ex delicto*, and that the causes of action were not improperly joined.

Who Entitled to Benefit of Fence—Pasturing Stock on Land of Another.—A person, having merely a right to pasture his stock temporarily upon the land of another, is as much entitled to the benefit of a statute requiring railroad companies to fence their tracks as the owner of the land. McCoy *v.* Southern Pacific R. Co,, (Cal., May 20, 1891), 26 Pac. Rep. 629.

Animals Escaping from Pasture to Unfenced Field and then Going on Track.—In Smith *v.* Barre R. Co., (Vt., Jan. 12, 1892) 23 Atl. Rep. 632, which was an action for injuring a horse, it appeared that plaintiff put the horse out to pasture on the express agreement with the owners of the farm of which the pasture was a part that the horse should be kept there; that the horse strayed through a fence to a meadow, whence it got on defendant's tracks, and was injured. *Held*, that the court below properly refused to charge that plaintiff could not recover because the horse had no right to be in the meadow, and properly charged that the owners of the farm had the right to have the horse either in the pasture or meadow, and, as against defendant, the horse would have been rightfully in the meadow after escaping from the pasture.

Animals Going on Track at Crossing and Killed at Point Beyond.—In an action under the statute against a railroad company for killing mules which had entered on the track at a crossing where the company had neglected its duty to maintain fences and guards, it is no defense that the mules passed along the track, and were killed at a point thereon where the company was not bound to maintain such fences and guards. Louisville, N. A. & C. R. Co. *v.* Etzler, (Ind., Feb. 5, 1892), 30 N. E. Rep. 32.

ARKANSAS MIDLAND R. CO.

v.

WHITLEY.

(54 Arkansas, 199.)

Contract to Maintain Cattle Guards—Statute of Frauds.—A contract of a railroad company to maintain cattle guards on each side of a person's land, so long as a railroad is operated over it, is not a contract "not to be performed within one year from the making thereof," within the meaning of the statute of frauds, and need not be in writing.

APPEAL from Monroe Circuit Court.
John C. Palmer, for appellant.
Sanders & Watkins, for appellees.

BATTLE, J.—This was an action for damages that were caused by a breach of a verbal agreement entered into by appellant and appellees in 1872. The agreement was that appellees would permit appellant to build its railroad across their land, and that appellant would, in consideration thereof, construct, keep and maintain good and sufficient cattle guards across its road on each side of appellees' land, to prevent stock running at large from trespassing on their fields. In pursuance of this agreement, the road was built over the land, but good and sufficient cattle guards were not kept and maintained. Appellant insists that the action cannot be maintained because the agreement comes within the statute of frauds. This is the only question presented for our consideration.

Case stated.

It is insisted that the agreement comes within the statute, because it was not to be performed within one year after it was made, and no note or memorandum thereof was made. Section 3371 of Mansfield's Digest, upon which this contention is based, provides: "No action shall be brought * * * to charge any person upon any contract, promise, or agreement that is not to be performed within one year from the making thereof, unless the agreement, promise, or contract upon which such action shall be brought, or some note or memorandum thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized.

Substantially the same clause in 29 Car. II. chap. 3, §4, was considered, a short time after its enactment, by all the judges in Peter *v.* Compton, Skin. 353. In that case the action was upon an agreement by which the defendant, for one guinea, promised to give the plaintiff so many at the time of his marriage. The marriage did not occur within the year, and the question was, did the agreement come within the statute? The decision of the question depended upon the meaning of the words "upon any agreement that is not to be performed within the space of one year from the making thereof," in the statute. A majority of the judges held that it did not, and that, "where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year." Since then the same question has generally been decided in England and America as held in Peter *v.* Compton, 1 Smith, Lead. Cas. pt. 1 (8th Ed.) 614, and note.

Contract need not be in writing.

In Fenton *v.* Emblers, 3 Burrows, 1278, the defendant's testator promised the plaintiff "that, if she would become his housekeeper, he would pay her wages after the rate of £6 per annum, and give her, by his last will and testament, a legacy or annuity of £16 by the year, to be paid yearly. The plaintiff, on this agreement, entered into the testator's service, and became his housekeeper, and continued for more than three years." The court held that the contract, though by parol, did not come within the statute; for the contingency upon which it depended might have happened within a year.

In construing the one-year statute of fraud in McPherson *v.* Cox, 96 U. S. 404, Justice MILLER, in delivering the opinion of the court, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within that time. In other words, to make a parol contract

void it must appear that it was the understanding of the parties that it was not to be performed within a year from the time it was made." In that case it was held that a contract to pay an attorney at law for his services, to be rendered in suits concerning land, a specific sum of money, out of the proceeds of the sale of the land, when it was sold by the client, did not come within the statute, for it might have been performed within the year. Walker *v.* Johnson, 96 U. S. 424.

In determining when contracts come within the one-year statute of frauds, courts have been governed by the words "not to be performed." They have treated them as negative words. In construing them, it is said: "It is not sufficient to bring a case within the statute that the parties did not contemplate the performance within a year, but there must be a negation of the right to perform it within the year." According to this rule of construction, it is well settled that the statute only includes those contracts of agreements which, according to a fair and reasonable interpretation of their terms, in the light of all the circumstances which enter into their construction, do not admit of the performance in accordance with their language and intention, within a year from the time they were made, and that it includes no agreement, if consistently with its terms, it may be performed within that time. Accordingly, it is also well settled that agreements which contain no stipulation as to time, but depend for performance, either expressly or by reasonable implication, upon the happening of a certain contingency which may occur within the year, do not come within the statute, as, for instance, promises to pay money on the day of the promissor's marriage, or on the death of a third party, or during the promisee's life; to work for another during his life; to board the promisee during his life; to educate a child,—are not within the statute: "and so, of course, whatever else be the contingency, provided it may happen within a year." Roberts *v.* Rockbottom Co., 7 Metc. (Mass.) 46; Lynn *v.* King, 11 Metc. (Mass.) 411; Foster *v.* McO'Blennis, 18 Mo. 88; Lapham *v.* Whipple, 8 Metc. (Mass.) 59; Artcher *v.* Zeh. 5 Hill, (N. Y.) 200; Lawrence *v.* Cooke, 56 Me. 187; Peters *v.* Westborough, 19 Pick. (Mass.) 364; Ellicott *v.* Peterson, 4 Md. 487; Town Lot Co. *v.* Walker, 39 Iowa, 406; Plimpton *v.* Curtiss, 15 Wend. (N. Y.) 336; Russell *v.* Slade, 12 Conn. 460; Rogers *v.* Brightman, 10 Wis. 65; Jilson *v.* Gilbert, 26 Wis. 637; Meyer *v.* Roberts, 46 Ark. 84; Browne, St. Frauds, (4th Ed.) §§ 273–283, and cases cited; 1 Smith, Lead. Cas. pt. 1, (8th Ed.) top pages 619–623, and cases cited.

In this case the duration of appellant's promise to keep

and maintain good and sufficient cattle guards was limited by the time it should maintain and operate its road over appellees' land. If the road should cease to be used for railroad purposes or be removed from the lands of appellees to other lands, as has occurred in other cases, it would be unreasonable to require the cattle guards to be maintained, the reason therefor no longer existing. In that event the time of the performance of the agreement would expire. This might well have happened within a year, consistently with the understanding and rights of the parties. As its performance depended on an implied contingency which might have occurred within one year after it was made, it does not come within the statute of frauds.

Affirmed.

REGAN

v.

NEW YORK & NEW ENGLAND R. CO.

(*Connecticut Supreme Court of Errors, March 4, 1891*).

Fire Caused by Railroad—Effect of Insurance on Property—Reduction of Damages.—Under a statute making a railroad company liable for the destruction of property by fire communicated from locomotive engines, whether it was guilty of negligence or not, the fact that the property destroyed was insured and the owner has received the insurance money, does not entitle the railroad company to have the damages for which it is liable, reduced to that extent.

Same—Interest on Damages.—Where property, having a definite money and market value, is destroyed by fire through the negligence of a railroad company, the owner is entitled to recover, in addition to the value of the property at the time of its destruction, interest thereon from that date.

APPEAL from Tolland Superior Court.

E. D. Robbins, for appellant.

A. P. Hyde and *C. Phelps*, for appellee.

LOOMIS, J.—This is a complaint to recover damages for the loss of goods belonging to the plaintiff, which on the 13th day of July, 1889, were destroyed by a fire communicated by a locomotive engine belonging to and in the use of the defendant corporation. The action is predicated upon section 3581 of the General Statutes, which provides as follows: "When any injury is done to a building or other property of any person, by fire communicated by a locomotive engine of any railroad company, without contributory negligence on the part of the person entitled to the

Case stated.

care and possession of the property injured, the said railroad company shall be held responsible in damages to the extent of such injury to the person so injured; and every railroad company shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

The defendant suffered a default, and a hearing in damages was had before the court. The court found all the facts essential to a recovery of compensatory damages, and assessed as such damages the sum of $13,091.95, and rendered judgment for the plaintiff to recover that sum of the defendant, and his costs. Upon the hearing, the counsel for the defendant inquired of the plaintiff, as a witness, if he had not received from insurance companies some compensation for the damages to said goods by said fire. This was objected to by the plaintiff, and excluded by the court. Was this ruling erroneous? In the first place, if we assume that, under proper pleadings, the defendant might be allowed a reduction equal to the amount of insurance collected by the plaintiff on the goods destroyed, we do not think it admissible, as the pleadings were at the time of the hearing. It is true that in this case there was no answer, but a default, which admitted the allegations of the declaration to be true; but an admission of the truth of the allegations could surely give no greater latitude of proof upon the subject of the damages than a denial. Both parties must be confined to such questions of damage, and such matters of aggravation or mitigation, as would naturally arise from the facts stated in the complaint. The plaintiff could not show special or consequential damages not averred and not naturally flowing from the cause of action described, nor could the defendant, on the other hand, have the benefit of a set off, recoupment, or any other ground for the reduction of damages, depending on some independent transaction between the plaintiff and a third person. The matter to be proved by the rejected evidence upon the defendant's assumption would be a complete defense, except for the default. If it equaled in amount the value of the goods, it would be an absolute bar to the action; otherwise it would be a bar *pro tanto*.

Reduction of damages on account of insurance.

But, irrespective of the pleadings, the ruling complained of was clearly right upon the merits of the question. Any other conclusion would seem to us utterly at variance with established principles and sound reason, and contrary to an unbroken line of decisions by the courts of England and the United States. If the defendant is entitled to have the insurance money deducted from the amount otherwise due, it

must be because it owns or has some legal claim to the money. How happens it that the defendant corporation is entitled to this money? Not because it ever paid the premium or any part of it, nor because the policy was obtained for its benefit or upon its request, nor because there is any privity between it and the insurance company. Our own court in Connecticut Mut. Life Ins. Co. *v.* New York & N. H. R. Co., 25 Conn. 265, held that there was no privity between the defendant, whose negligence caused the death of the insured, and the insurance company, who issued the policy on the life of such person, and this position accords perfectly with the law in other jurisdictions. The defendant, instead of paying anything towards procuring the policy, by its extraordinary use of the dangerous element of fire in close proximity to the plaintiff's property rendered it necessary for him to pay a much larger sum to obtain his insurance than would otherwise have been required.

How, then, can the defendant claim, as it does, the exclusive benefit of the insurance? It came to the plaintiff from a collateral source, wholly independent of the defendant, and which as to him was *res inter alios acta.* The defendant, in our judgment, has no more claim to the insurance money than it would have to money obtained upon a subscription paper which the friends of Regan may have procured to make good his loss. How can the defendant make any distinction between money raised voluntarily after the loss, and that obtained from a contract of indemnity to which it was no party, and had paid no part of the consideration? The statute upon which the action is founded justly imposes an absolute primary liability on the defendant for having caused the loss. But the ruling which the defendant asked for would completely nullify the statute as applicable to such a case as this, by practically imposing the primary obligation on the insurer, who is innocent, and allowing the defendant, who caused the loss, and who alone could have prevented it, to go entirely free, at least to the extent of the insurance; for the insurer, having paid the money due the insured, could not get it back from him; and of course the insured, after such deduction from his damages, would have no remaining right to which the insurer could be subrogated to recover the money back again from the defendant. If the principles that underlie the defendant's position are correct, had the loss been paid in full in ignorance of the fact that the plaintiff had obtained insurance, the defendant might bring a suit against the plaintiff to recover the money so paid; or had the money due on the policy not been paid, the defendant, after paying the loss in full, could intervene to

prevent the amount due on the policy from being paid to the insured or any other than itself. What a strange subrogation that would be, to put the party who caused the loss in the place of the insured to enforce the contract between the latter and his insurer! And what a strange revolution would be made in the relation of the parties were we to adopt the defendant's contention! It has hitherto been established by a line of decisions reaching backward more than a century, and substantially unbroken by dissent, that there is no privity in such cases between one made primarily liable for such a loss and an insurance company; that the liability of the insurer is merely secondary; that the insurer's position is practically that of a surety; that insurance is personal, and does not inure to the benefit of one not a party thereto; and that, where the insurer has indemnified the owner of the goods lost, he is entitled to be subrogated to all the means of indemnity which the owner held against the party causing the loss, and primarily liable therefor.

The true relations of the parties and the law on the subject under discussion are very clearly shown by the opinion of the court delivered by Chief Justice SHAW in the case of Hart *v.* Western R. Corp., 13 Metc. (Mass.) 99, which was an action on a statute identical with our own, in that it provided that when any injury was done to a building of any person by fire communicated by a locomotive engine of a railroad corporation, the corporation should be responsible in damages to the person so injured, and such liability, as in the case of our statute, was irrespective of any actual proof of negligence. The plaintiff's house was destroyed by a fire communicated by a locomotive engine of the defendants, and the underwriters paid to the owner of the house the amount of his loss, and it was held that such payment did not bar the owner's right to recover of the railroad corporation, and that the owner, by receiving payment of the underwriters, became trustee for them, and they could prosecute the suit against the railroad corporation in the name of the owner, who could not even release the railroad corporation so as to affect the rights of the underwriters to recover. In delivering the opinion Chief Justice SHAW said: "Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger. * * * The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit

from it. * * * Now, when the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from, and growing out of a legal provision attached to and intrinsic in the subject insured. The liability of the railroad company is in legal effect, first and principal, and that of the insurer secondary; not in the order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company by his right at law, or to the insurance company in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to-wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives the whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected. We think this position is exceedingly well sustained by authorities."

And if the principles were so well sustained then, in 1847, when that opinion was written, they are now, after the lapse of more than forty years, still more strongly supported. Mason *v.* Sainsbury, 3 Doug. 61; Clark *v.* Inhabitants of Hundred of Blything, 3 Dowl. & R. 489, 2 Barn. & C. 254; Yates *v.* Whyte, 4 Bing. (N. C.) 272; Randal *v.* Cockran, 1 Ves. Sr. 98; Assurance Co. *v.* Lister, L. R., 9 Ch. App. 483; The Monticello *v.* Mollison, 17 How. (U. S.) 152; Hall *v.* Nashville & C. R. Co., 13 Wall. (U. S.) 367; Clark *v.* Wilson, 103 Mass. 219; Hayward *v.* Cain, 105 Mass. 213; Harding *v.*

Town of Townshend, 43 Vt. 536; Monmouth County Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107; Weber *v.* Morris & E. R. Co., 35 N. J. Law, 409; Same *v.* Same, 36 N. J. Law, 213; Collins *v.* New York Cent. & H. R. R. Co., 5 Hun (N. Y.), 503; Connecticut Fire Ins. Co. *v.* Erie Ry. Co., 10 Hun (N. Y.), 59; Merrick *v.* Brainard, 38 Barb. (N. Y.) 574; Althorp *v.* Wolfe, 22 N. Y. 355; Merrick *v.* Van Santvoord, 34 N. Y. 208; Carpenter *v.* Eastern Transportation Co., 71 N. Y. 574; Briggs *v.* New York Cent. & H. R. R. Co., 72 N. Y. 26; Gales *v.* Hailman, 11 Pa. St. 515; Rockingham Mut. Fire Ins. Co. *v.* Bosher, 39 Me. 253; Disbrow *v.* Jones, Har. (Mich.) 48; Sherlock *v.* Alling, 44 Ind. 184; Swarthout *v.* Chicago & N. W. R. Co., 49 Wis. 625, 1 Am. & Eng. R. Cas. 625; Pratt *v.* Radford, 52 Wis. 114, 606; Honere *v.* Lamar F. Ins. Co., 51 Ill. 414.

In 1 Suth. Dam. p. 242, it is said: "There can be no abatement of damages on the principle of partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta.* A man who was working for a salary was injured on a railroad by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant sued for such injury in mitigation. Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such agreement would be to allow the wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." The same thing, in substance, is said in Wood's Mayne, Dam. p. 155, § 114. In the above quotation the doctrine of the cases cited is well summarized, and we forbear further citations from the opinions in those cases, except such as bear directly upon the particular point which the defendant makes in this case; for the counsel for the defendant admits the general doctrine as applied to cases where the defendant caused the loss by negligence or some positive wrongful act; but his contention is that, under our statute, the railroad company and the insurance company are equally innocent in regard to the loss, and therefore the insurance company did not acquire, by payment of the

amount insured, any right of subrogation as against the defendant corporation. But we think this is an entire misconception of the defendant's true position and of the law relative to this subject.

In the first place, the defendant cannot, in the present posture of this case, say that the loss in question was not occasioned by its own negligence. It is explicitly found that there was no negligence on the part of the plaintiff, but it is not found that there was no negligence on the part of the defendant. In some cases the omission to find negligence would justify the claim that there was no negligence, but this cannot apply to such a case as this, where by law the presumption of negligence arises from the mere fact that the defendant caused the loss. In such cases the burden rests on the defendant to overcome the presumption by showing to the satisfaction of the court that there was no negligence. Section 1096 of the General Statutes provides that, "in all actions to recover for an injury occasioned by fire communicated by any railway locomotive engine in this state, the fact that such fire was so communicated shall be *prima facie* evidence of negligence on the part of the person or corporation who shall, at the time of such injury by fire, be in the use and occupation of such railroad." It may be said that, in the other section of the statutes, upon which the present action is particularly predicated, the railroad company causing the loss is made liable irrespective of any finding of negligence, and, as such fact was immaterial, the defendant ought not to be prejudiced by failing to show that there was no negligence. If, however, the defendant's present contention is correct, that the amount of the damages depends upon the fact of negligence or no negligence, then it is material to the question under consideration, and the defendant must read under the statutory presumption that the loss was caused by negligence.

But there are other still more satisfactory answers to the objection under consideration. The sole foundation for the defendant's contention rests on the fact that the railroad company and the insurance company, in their relation to the loss, are equally innocent, in contemplation of the law. Now, any proper theory of the statute under consideration will utterly exclude such an idea. The theory of the statute is that, as the railroad corporation is privileged, for its own profit, to use, for purposes of rapid locomotion, the dangerous element of fire in close proximity to adjoining combustible property, and as it alone, through its own agents, who construct and manage its locomotive engines, has power to prevent the communication of fire to the adjoining property, if

fire is communicated from its engines and the property of another is thereby destroyed, there is legal fault, predicated upon the mere fact of a loss so caused, and the railroad corporation is made absolutely liable to make good the loss to the owner, irrespective of any finding as to negligence. In view of this statute, it seems to us almost preposterous to hold that the defendant who causes the loss is equally innocent with the one who merely issues to the owner of the property an ordinary policy of insurance.

But there is still another independent answer to the point referred to, namely, that the principles established by the authorities render it immaterial whether or not the loss was occasioned by any positively negligent or wrongful act. This is shown, first, by the leading English cases, where the doctrine which we apply to this case originated, and which cases are referred to and cited with approval in all the leading American cases on the subject. The earliest case on this subject is that of Mason *v.* Sainsbury, 3 Doug. 61, (decided in 1782.) It was an action against the community known in England as the "hundred"—a division of a county—to recover damages sustained by a demolition of a house by the act of certain rioters in 1780. The plaintiff had an insurance on the house destroyed, which the insurance company (or office as it is there called) paid without suit, and this action was brought in the name of the plaintiff, with his consent, for the benefit of the insurance company. The judges all agreed that the plaintiff was entitled to recover. Lord MANSFIELD said: "The office paid without suit, not in ease of the hundred and not as co-obligors, but without prejudice. It is to all intents and purposes as if it had not been paid. The question then comes to this,—can the owner, having insured, sue the hundred? Who is first liable? If the hundred, it makes no difference; if the insurer, then it is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear, the act puts the hundred, for civil purposes, in the place of the trespassers; and upon principles of policy, as in the case of other remedies against the hundred; I am satisfied that it is to be considered as if the insurers had not paid a farthing." BULLER, J., said it was to be treated as an indemnity, in which the principle is that the insurer and the insured are as one person, and the paying by the insurer, before or after, can make no difference.

In Clark *v.* Inhabitants of Hundred of Blything, 3 Dowl. & R. 489, (decided in 1823), it was held that the owner of stacks of corn maliciously destroyed by fire, set by some persons unknown, may maintain an action against the hundred on the act of 9 Geo. I., chap. 22, although he has previously received the full amount of his loss from an insurance office. ABBOTT, C. J., in delivering the opinion, said he could not entertain a doubt as to the propriety of the decision in Mason *v.* Sainsbury, and added: "The intention of the legislature in passing this and other statutes of the same nature was twofold,—to render the inhabitants of hundreds vigilant for their own sake, as well as that of the public, by making them interested in the prevention of offenses, and, where that is impossible, in the apprehension and conviction of offenders. * * * With respect to the question whether it is competent for the defendants to set up in their own defense a contract made between third persons, it seems to me that the principle of the act fully justifies the decision of the former case, and that we should be acting in violation of the principle if we were to disturb the present verdict."

The analogy between the cases just cited and the one at bar, particularly as they stand related to the question under consideration, would seem to be nearly perfect. By sundry statutes passed by parliament at different times, the particular community known in England as the "hundred" was made liable, in the cases specified, to make good the loss sustained by individuals within the hundred by robbery, riot, and other violent crimes committed within their jurisdiction. The community might be ever so vigilant to prevent, discover, and punish crime, and might leave nothing whatever undone which it was their legal or moral duty to do, and yet they would be liable just the same as if actual culpability were proved. The only distinction that can be made between these cases and the one at bar will render them still stronger as authorities against the position of the defendant, for it is manifest that the hundred had far less power in fact to prevent the commission of the crimes referred to and the losses therefrom than a railroad corporation with us has to prevent the communication of fire to adjoining property, and yet the statutes referred to imputed to the hundred, upon the mere happening of loss from the commission of the crimes referred to, a legal fault or wrong which made them absolutely liable to make good the loss. So our statute conclusively fixes a legal fault or wrong upon a railroad corporation that fails to so construct and manage its locomotive engines as absolutely to prevent loss of property of another, from fire communicated by it in the way and manner

specified, and makes it primarily liable to make good the loss.

The statutes in the case of the hundred were designed to make the inhabitants vigilant to prevent and punish crime. So one purpose of our statute was to make railroad corporations more careful and vigilant to prevent loss from fire; but another and perhaps more controlling purpose was to place the loss, should it happen, where justice required it to be placed, namely, on the one who caused the loss, while exercising the privilege and making a profit out of the hazard which it thereby imposed as a burden on the adjoining property; and this furnishes most ample vindication of our statute, whatever we may think of the statutes concerning the hundred.

In further contravention of the defendant's position, we might cite all those cases where the doctrine under consideration was applied to carriers, who are by law made absolutely responsible for the safe delivery of goods intrusted to them, with the single exception of losses arising from the act of God, irrespective of any negligence or positively wrongful act. The principle of these cases is stated and approved in Sheldon on Subrogation, § 229. We will cite two of this class of cases, where the precise point now made was raised and decided adversely to the defendant by courts of as great ability as any in the United States. The first case is that of Hall *v.* Railroad Cos., 13 Wall. 367. The headnote is as follows: "An insurer of goods consumed and totally destroyed by accidental fire, in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid by suit in the name of the assured against the carrier. It is not necessary, in order to sustain such a suit, to show any positive wrongful act by the carrier." Mr. Justice STRONG, in delivering the opinion of the court, said: "It is too well settled by the authorities to admit of a question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the

peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity." Then, after citing several pertinent cases, the opinion proceeds: "It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers: but that in the present case the fire, by which the insured goods were destroyed, was accidental, without fault of the defendants; and therefore they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. * * * In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss."

The case of Gales *v.* Hailman, 11 Pa. St. 515, is equally in point. In a very able opinion by GIBSON, C. J., it was held that "a shipper, who has received from his insurers the part of the loss insured against, may sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as trustee for what has been paid by the insurer; and upon the trial the court will restrain the carrier from setting up the insurer's payment of his part of the loss as satisfaction for so much of the demand at law. The carrier cannot, in case of his own liability, call upon the insurer for contribution upon the principle of double insurance; for the carrier is not an insurer, though he is sometimes inadvertently called so."

The only case cited by the counsel for the defendant in support of his contention is Harding *v.* Town of Townshend, 43 Vt. 536; but we regard the case as strongly against him. It was an action against a town for damages occasioned by a defective highway, and it was held that the defendant was not entitled to have deducted the amount received by the plaintiff from an insurance company on account of the injuries for which he claimed to recover against the town, which would seem to be precisely the point now under consideration. The principles upon which the decision was made to rest are equally in point. They are given in the first part of the opinion of the court delivered by PECK, J., who says; "There is no technical ground which necessarily leads to the conclusion that the

money received by the plaintiff of the accident insurance company should operate as a defense or inure to the benefit of the defendant. The insurer and the defendant are not joint tort-feasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of it the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties or by contract or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit." These are the principles that controlled the case, and must equally control the one at bar. But the opinion proceeds to answer objections on the part of the defense, and in the course of the discussion it is shown that the defendant as a wrong-doer is in no position to make such objections. These expressions were seized upon as the turning point of the case, when in our judgment they were not so intended at all. The opinion continues as follows: "But it is urged on the part of the defense that the plaintiff is entitled to but one satisfaction. If we assume this to be a correct proposition, the question arises whether the defendant stands in a condition to make this objection. This depends on the question who, as between the insurer and the defendant, ought to pay the damage,—which of the two ought primarily to make compensation to the plaintiff and ultimately to bear the loss." Then, after referring to the obligation of the town to keep its highways in good repair, it is added: "The defendant is found liable in consequence of the breach of this duty. The defendant town, therefore, in respect to the injury the plaintiff has sustained, is the wrong doer; and whether by some positive, affirmative act, or by culpable negligence, does not vary the principle applicable to the case." Although it was very natural, in answering the particular objection of the defendant, to call the town a wrong-doer, and to argue the matter upon that basis, yet the above extract makes it obvious that the court did not intend, by wrong-doer, one necessarily guilty of positive negligence. This view is materially strengthened by what follows, where it is said: "In principle, the

question involved in this case has been settled in analogous cases;" citing Mason *v.* Sainsbury, *supra*, and Clark *v.* Inhabitants of Hundred of Blything, *supra*, where, as we have seen, there was no actual wrong, but only a statutory one, as in the case at bar.

In commenting on the case of Harding *v.* Town of Townshend, counsel for the defendant seemed to assume that, to entitle the insurance company to be substituted in the place of the plaintiff, it must appear that the defendant was guilty of negligence or some positive wrongful act. Such, however, is not the true doctrine, but it is this: "Where one person discharges an obligation which primarily rests upon another, he shall be subrogated to the place of the injured party or the creditor, in respect to the party who is primarily liable." Connecticut Fire Ins. Co. *v.* Erie Ry. Co., 10 Hun (N. Y.), 59; Aetna F. Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 397; Wood. Ins. 793, note 1.

Rule of damages—Interest.

One other point made on the trial has been assigned for error, although it was not noticed in the argument for the defendant. The defendant claimed that the rule of damages was the value of the goods at the time of their destruction, without interest, but the court allowed interest from the date of the injury to the date of judgment. It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such, for instance, as assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof, there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods, at the time of their destruction, of the interest from that time to the date of judgment. This court has already applied such a rule to actions of trover for the conversion of goods, as in Clark *v.* Whitaker, 19 Conn. 319, and Cook *v.* Loomis, 26 Conn. 483, and to the action of trespass for taking personal property, as in the case of Oviatt *v.* Pond, 29 Conn. 479. There was no error in the judgment complained of. The other judges concurred.

Interest on Value of Property Destroyed by Fire.—See Johnson *v.* Northern Pacific R. Co., (N. Dak.), 45 Am. & Eng. R. Cas. 554, note 40 *Id.* 253, and cases there cited.

Right of Railroad Company to Claim Reduction of Damages on Account of Insurance on Person or Property Injured.—See note 42 Am & Eng. R. Cas. 343; Texas & Pacific R. Co. *v.* Levi, (Tex.), 13 *Id.* 464; Nichols *v.* Chicago, St. P., M. & O. R. Co., (Minn.), 29 *Id.* 175; Cunningham *v.* Evansville Terre Haute R. Co., (Ind.), 23 *Id.* 347.

JACKSONVILLE, TAMPA & KEY WEST R. Co.

v.

PENINSULAR LAND, TRANSPORTATION & MANUFACTURING Co.

(*Florida Supreme Court, April 25, 1891.*)

Fires set by Locomotive—Liability of Company Operating Railroads of Another Company.—A railroad company, which operates a railroad owned by another company, is liable for damages occasioned by fires negligently set by its locomotives whether its possession of such railroad is legal or illegal. No exemption from such liability is caused by the fact that its possession and operation of the road are under an agreement with the owner of the road, by the terms of which the company is to operate the road in its own right, furnish the rolling stock, and to charge for the use of the same, and also to charge a certain per cent. of its own expenses as the operating expenses of such road.

Presumption of Negligence from Occurrence of Fire.—The mere emission of sparks from a locomotive, or the setting out of fires thereby, is not, *per se*, evidence of negligence on the part of a railroad company; but when the emission is of such character as is inconsistent with the experience or the known efficiency of approved spark arresters properly used, it is evidence of negligence. If sparks of unusual size or in unusual quantities are emitted, a presumption of negligence arises which the railroad company has the burden of rebutting.

Same—Rebuttal of Presumption—Irreconcilable Testimony—Finality of Finding of Jury.—In an action against a railroad company for the destruction of property by fire, where the evidence for the plaintiff shows an escape of sparks from the locomotive of an extraordinary size and in unusual quantities, or far in excess of anything likely to occur in the ordinary operation of a proper locomotive properly managed, and the evidence in behalf of the defendant shows that the engine was in good condition and supplied with proper appliances for arresting the escape of sparks, and was properly managed, and the evidence further shows that sparks of the size and quantity indicated could not have escaped if the engine was supplied with proper appliances and was properly managed, and there is a verdict in favor of the plaintiff, which in effect affirms negligence on the part of the defendant, such finding will not be disturbed by an appellate court. The testimony is irreconcilable and the question is for the jury.

Care Required in Running Train Through Town—Inflammable Buildings—Instruction.—A charge that a railroad company is required to exercise the "utmost care" in running its trains through a town or village where buildings are constructed of wood and situated so near the track as to be exposed to fire from the locomotives, especially if the wind is blowing in the right direction; and that under such circumstances the company is

bound to exercise a greater degree of care than in running trains in the country where there is no property near the track exposed to fire; and that the degree of care which is required is proportioned to the danger to be apprehended of inflicting injury, does not prescribe a greater degree of care than the circumstances stated in it call for.

Duty of Company as to Spark Arresters—Best Mechanical Inventions.—A charge that a railroad company is required to furnish its locomotives with spark arresters of the best mechanical invention and construction in general use at the time, is not erroneous.

Contributory Negligence—Negligence of Third Person Allowing Accumulation of Combustible Material.—The negligence of town authorities in allowing the accumulation of inflammable trash in the streets, and the negligence of a third person in permitting such accumulation near his building, however much they may have contributed to the destruction of the plaintiff's property by fire, is no defense in behalf of the defendant railroad company if its negligence was the proximate cause of the plaintiff's loss.

Duty of Property Owner to Guard against Fire—Right to Enjoy Property Exposed to Sparks.—A person having property adjacent to a railroad is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, but every person has the right to enjoy his property in the ordinary manner; and while one is charged with the duty of saving his property whenever he can do so, he is under no obligation to stand guard over it to protect it from the negligence of the railroad company. The fact that the property is exposed to the reach of sparks from the locomotive is no defense to an action for the injury caused by the company's negligence. A person may construct buildings on any part of his property and enjoy the same without rendering himself liable to the negligence of a railroad company.

Negligence of Lessee of Property Burned—Instructions.—Assuming, but not deciding, that the negligence of a lessee or hirer of property in not saving it, or any part of it, may, under some circumstances, preclude the lessor or owner from recovering from the person whose negligence was the proximate cause of a fire by which it was destroyed, the rejection of charges to such effect is immaterial to the defendant when the testimony shows that the lessee not only endeavored to save, but actually saved, some of the property, and does not show that he was negligent in not saving other property than that which he did save, but there is not sufficient testimony in the record to have enabled the jury to find that any particular property destroyed could have been saved by him in the exercise of due diligence.

Evidence of Other Fires.—Where the fire resulting in the injury complained of is shown to have been set by a particular locomotive, evidence of former fires set out by the same engine is admissible as tending to prove its defective construction or condition or improper management, but evidence of fires set out by other locomotives is inadmissible, because irrelevant.

Proximate Cause of Fire—Intervening Agency—Spread of Flames.—The question whether the fire that escaped from the defendant's locomotive was the proximate cause of the destruction of plaintiff's property, is one of fact for the jury. If the evidence shows that sparks, negligently permitted to escape, caused the original fire and that its natural and continuous spread could not have been arrested by the plaintiff, in the exercise of proper care, until it reached and destroyed his property, and that the destruction of his property was not caused by a new or intervening force, then, upon the question of proximate cause, it does not matter whether the buildings of the plaintiff were the first or the tenth to be consumed by such fire.

Measure of Damages for Property Destroyed—Ascertainment of Value.—The measure of damage in cases where the property of one has been destroyed unintentionally, but by the negligence of another, where there is no element of willfulness or maliciousness in its destruction, is just compensation in money for the property destroyed, such an amount as will fully restore the loser to the same property *status* that he occupied at the time of the destruction. To arrive at the amount of such compensation, inquiry, in the absence of malice, is to be confined strictly to the ascertainment of the value of the property destroyed, with interest thereon for the retention of such value from the date of the destruction.

Same—Property Having no Market Value—Evidence to Establish Real Value—Opinions.—Where properties destroyed by a fire negligently set out by a railroad company, have no market value at the place of destruction, then all such pertinent facts and circumstances are admissible in evidence as tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount with such pertinent data as will enable them reasonably and intelligently to arrive at a fair conclusion. And to this end the original cost of the property, the manner in which it has been used, its general condition and quality, the percentage of its depreciation since its purchase or erection,—are all elements of proof proper to be submitted to the jury. So, also, in such cases, it is proper to introduce the opinions of witnesses who are acquainted with the ordinary standard values of such properties.

Interest on Damages.—Interest upon the amount of the value of the property destroyed from the time of its destruction through negligence is a material and necessary element of damage as complete compensation, and it is proper for the court to instruct the jury to allow it.

Hearsay Evidence as to Origin of Fire—Declaration of Stranger.—A witness, on going to the scene of the origin of the fire, out of which the pending action arose, heard a stranger to the action say how, according to his understanding, the fire originated; but the trial court refused to permit him to state what the stranger said. *Held*, not error.

Same—Declaration of Witness.—The trial court permitted a witness, who was present at the origin of the fire out of which the action arose, to testify that he had said at the time "that if there were any coals under the plank walk we would have a blaze." *Held*, to be error, but, in view of their testimony in the case corroborating the correctness of the remark, error without injury.

Negligence may be Inferred from Circumstances adduced in evidence, and circumstantial evidence alone may authorize the finding of negligence.

Notice to the Agent to be Binding upon his Principal must be concerning some fact within the scope of the powers and duties of the agent as such.

Interrogatories as to Officer of Corporation.—The answers of an officer of a corporation to interrogatories for a discovery filed in an action at law, are admissible as evidence against the corporation on the trial of the cause. And objection by the corporation to the introduction in evidence of such answers on the ground that the officer was not one of such grade or character as should have answered, such objection not being made until the trial is on, nor supported by evidence, is properly overruled.

Order of Introduction of Proof—Discretion of Court.—It is within the discretion of a trial court to permit a plaintiff who may, before resting, have introduced enough testimony to make out a *prima facie* case, to introduce, after defendant has rested, additional proof in chief as distinguished from proof in rebuttal; and the exercise of this discretion is not assignable as error except in case of manifest abuse.

APPEAL from Orange County Circuit Court; JOHN D. BROOME, J.

The charges referred to in the following opinion, as numbered 3 and 20, are as follows:

"(3) That the question of negligence is one for the jury to determine; that, if the jury believes from the evidence that the property of the plaintiff was destroyed by fire, and that said fire was the primary result of the negligence of the defendant, either in not having proper appliances on his engine, or, if it did have them, in not having them so adjusted as to prevent the escape of the sparks in unusually large quantities, calculated to ignite combustible material, then the defendant is liable to the plaintiff; that is for the jury to decide whether the burning of the plaintiff's property was the direct consequence of fire caused by sparks from defendant's engine; that, if the jury believe the fire, where it originally started, was caused by sparks from the defendant's locomotive, and that said fire spread, whether from the force of the elements or the inflammable character of the buildings, and burned continuously from building to building to plaintiff's buildings and destroyed them, and that the plaintiff either had no power to arrest the flames, or was not present, and consequently could not do anything towards arresting the flames, the jury have the right to conclude that the fire set by the defendant's engine was the proximate cause of the destruction of the plaintiff's property."

"(20) That the defendants are required to exercise the utmost care in running through a town or village where buildings are constructed of wood, and are situated so near to their road as to be exposed to fire that may come in large and dangerous quantities from their locomotive; and especially so if at the time the wind was blowing in the direction from the engine towards the buildings. Under such circumstances, the defendants are bound to exercise a greater degree of care than would be required of them when running trains in the country, where there is no property near their track exposed to fire, and for the want of such care fire in large, unusual, and dangerous quantities is permitted to escape from the smoke-stack of their engine, and such fire is communicated, and they are consumed, the defendants are liable for the damage sustained thereby, unless the negligence of the owners of the building in caring for and protecting their property concurred in producing the result. That a degree of the care which is required of the defendant is to be proportioned to the danger to be apprehended of inflicting injury on the person or property of others, and the defendant controlling

the engine was bound to exercise the utmost vigilance while operating its engine on the streets of a village lined with wooden buildings; and if from the faulty construction of the engine, or from the want of proper appliances upon it to prevent the escape of sparks in large and dangerous quantities and of unusual size, or if from the failure to have such appliances so adjusted as to prevent the escape of sparks in large and dangerous quantities and of unusual size, or if from an unskillful management of the engine, or from want of such care, the property of the plaintiff is destroyed, the defendant is liable.'

J. R. Parrott, Robt. W. Davis, Hammond & Jackson and *T. M. Day, Jr.*, for appellant.

Alex. St. Clair-Abrams and *Beggs & Palmer*, for appellee.

Case stated.

RANEY, C. J.—This is an appeal from a judgment recovered against appellant by the appellee in April, 1890, for the sum of $52,909.03 and costs, in an action of trespass.

The amended declaration states that the defendant, who is a corporation under the laws of Florida, on April 9, 1888, owned, controlled, managed, and operated a railroad from the town of Sanford, in Orange county, to Tavares, in Lake county, in this state, known as the "Sanford & Lake Eustis Division of the Jacksonville, Tampa & Key West Railway Company"; and that at the same time, and at the time of the construction of the said Sanford & Lake Eustis road, the plaintiff, a body corporate under the laws of this state, was the owner of certain buildings in Tavares, to wit: The Peninsular Hotel, of the value of $40,000; a store building on Tavares boulevard, at the corner of New Hampshire avenue, of the value of $6,000; and another store building, on the same boulevard, and near the same avenue, of the value of $2,000; one livery stable, valued at $1,500; one cottage, on East Ruby street, valued at $600; another at the corner of the same street and Joanna avenue, valued at $500; two other cottages on the same avenue, valued, respectively, at $500 and $400; and one on Texas avenue, valued at $400; and that the plaintiff was at the time stated the owner of the following personal property, viz.: The furniture and entire outfit of the hotel, of the value of $16,000; the counters, shelves, cases, etc., in the first-named store, of the value of $1,000; chairs, tables, maps, desks, life-preservers, and harness of the value of $1,000; one outfit of printing material, of the value of $1,200,—the buildings, tenements, and personal property aggregating in value the sum of $72,100. That the railroad was constructed

along Tavares boulevard, within 150 feet of plaintiff's stores and hotel, and within 1,000 feet of all the other above-described property; and that defendant, although well aware of the inflammable nature of the material of which the buildings, tenements, and personal property was composed, and of their liability to take fire, negligently and carelessly permitted its locomotive engines, operated and controlled by its agents, servants, and employes, to be run along the said boulevard without taking necessary and proper precaution to prevent sparks of fire escaping from the smoke-stack of the locomotive engines, thereby endangering the property of the plaintiff to destruction by fire; and that, on the morning of the day aforesaid, the defendant's train of cars, drawn by one of its locomotive engines, and controlled, managed, and operated by one of its employes, agents, and servants, started from the said boulevard for Sanford, the said locomotive not having a spark-arrester therein, (if there was any spark-arrester at all,) so arranged as to prevent the escape of sparks from the smoke-stack; and the defendant having negligently, recklessly, and carelessly omitted and failed to exercise due care and precaution to prevent the escape of sparks of fire from the smoke-stack of said locomotive engine, and not exercising due care and diligence in managing, controlling, and operating the locomotive, it, the said locomotive, there being at the time of leaving said boulevard, and before, a high wind blowing, threw out from its smoke-stack a considerable number of sparks and blazing fragments of wood, which then and there set fire to a certain wooden sidewalk on said boulevard, and the fire was communicated to the adjacent buildings, including the plaintiff's said buildings, tenements, and personal property, and plaintiff's properties aforesaid were, all and each of them, totally destroyed by said fire; the plaintiff being without fault, and unable to arrest or prevent the spread of the fire, which fire was caused by the gross negligence of defendant in not exercising due care and precaution in preventing the escape of the sparks from the locomotive; the plaintiff claiming $75,000 damages.

A demurrer was filed to this declaration; but, the general assignment of error, that the action of the court overruling it was erroneous, having been submitted "without argument," we may treat the assignment as abandoned. We may remark, however, that we perceive no defect in the declaration.

The demurrer having been overruled, the defendant filed five pleas:

(1) Not guilty.

(2) That it did not own, manage, control, or operate a cer-

tain railroad, or any railroad, running from the said town of Sanford to that of Tavares, and known as the "Sanford & Lake Eustis Division of the Jacksonville, Tampa & Key West Railway," and was not the owner, manager, controller, or operator of any such railroad on the 9th day of April, 1888, or at any time prior or subsequent to this date.

(3) That plaintiff is not a corporation, as alleged.

(4) That the plaintiff, by its own acts, so contributed to its own loss and injury that it has no right of action.

(5) That whatever loss or damage the plaintiff may have sustained, as set forth in the declaration, was by its own fault and negligence.

Issue was joined on these pleas, but the third plea has been abandoned in this court.

The questions to be considered next arise under the issue made by the second plea.

The plaintiff delivered to the defendant's attorney, on July 30, 1889, interrogatories for discovery, addressed "to the superintendent" of the defendant company, "an officer of said body corporate," and other interrogatories addressed to Charles C. Deming, secretary of the defendant company, "an officer of said body corporate"; such interrogatories being accompanied by a notice to such attorney, requiring that the interrogatories should be answered by affidavit within ten days. Answers to the former interrogatories were made by one J. A. Larned (he swearing that he is superintendent of the company) on the 31st day of the following month, and to the latter by Deming, the secretary, two days before; and on the 12th of September other interrogatories, addressed to the same secretary, were served, and he answered them on the 1st day of October; and afterwards, on a subsequent day in the same month, filed an amendatory answer. Contemporaneously with the last-mentioned interrogatories there were served others addressed to the "superintendent" of the defendant company, "an officer of said body corporate," which were answered October 4th by one C. O. Parker, who states, among other things, in his affidavit, that he is the assistant general manager of the defendant company. On the 25th of the last-named month the plaintiff, by notice addressed to the defendant company, and to J. A. Larned, superintendent thereof, required them to answer accompanying interrogatories addressed to J. A. Larned, such superintendent, and he answered them early in the succeeding month.

Upon the answers, with the interrogatories, being offered in evidence, they were objected to, but the court overruled

the objection, and permitted them to be read, and this ruling is assigned as error.

The interrogatories were filed under certain provisions of "An Act to amend the pleadings and practice of the courts of this state," approved February 8, 1861, (sections 18–21, McClel. Dig. pp. 516, 517.) The eighteenth and nineteenth of these sections are as follows:

"(18) In all causes in any of the courts of the state the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them may, at any other time, deliver to the opposite party or his attorney interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge may allow, shall be deemed to have committed a contempt of court, and shall be liable to be proceeded against accordingly."

"(19) In case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or judge, at their or his discretion, to direct an oral examination of the interrogated party as to such points as they or he may direct, either before the court or judge or clerk; and the court or judge may, by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination and the costs of the application, and of the proceedings thereon and otherwise, as to such court or judge shall seem just."

The twentieth section is as to the return of depositions, taken under the preceding section, and authorizes office copies to be given to the opposite party. The other section is as to reports by the examiner and costs.

It is contended that these sections have been repealed by the Act of February 4, 1874, entitled "An Act in relation to testimony in civil actions," (chapter 1983 of the Statutes; section 24, p. 518, McClel. Dig.,) which statute enacts that no person offered as a witness in any court, or before any officer acting judicially, shall be excluded by reason of his interest in

Effect of practice act authorizing interrogatories.

the event of the action or proceeding, or because he is a party thereto, providing, however, the parties to and those interested in the event of an action, their assignees, and those under whom such parties or interested persons claim, shall not testify as to any transaction or communication between such a witness and a person then deceased or lunatic, against the representative or assignee of such deceased person, or the assignee or committee of such insane person, unless such representative, assignee, or committee shall be examined in his own behalf as to such transaction or communication, or unless the testimony of such deceased person, or who may have become lunatic, shall be given in evidence.

The purpose of the Act of 1861 was to enable parties to actions at law to obtain "discovery" without having to resort to the expensive and tardy procedure by bill in equity for such purpose. In Wilson *v.* Webber, 2 Gray, (Mass.) 561, it is said of a substantially similar statute: "The main purpose of these provisions * * * was to substitute in place of the tedious, expensive and complex process of a bill of discovery on the equity side of the court an easy, cheap and simple mode of interrogating an adverse party, as incident to and part of the proceedings in the clause in which the discovery was sought. It was not intended to make the parties to a cause witnesses, who might, at the pleasure of the party interrogating, be made to testify respecting the whole case; but only to give a limited right to obtain evidence from an adverse party in analogy to the well-settled rules regulating bills of discovery in the court of chancery in England. See, also, Bayley *v.* Griffiths, 1 Har. & C. 429. In Williams *v.* Cheney, 3 Gray, (Mass.) 215, 217, 220, where the defendants proposed to read in evidence the answers of the plaintiff to interrogatories filed by the defendants to another suit pending in the same court, but in which the issues were not the same as those in that in which it was proposed to read them, it was held that such answers were competent evidence, so far as they contained admissions by him of facts material and relevant to the points in issue in the latter action; and it is said of the statute that its provisions secure to parties the right to make complete statements of all facts in relation to which they may be interrogated in any suit, and guard them against being compelled to make partial and garbled disclosures in answer to artfully contrived questions. There can, therefore, be no danger or hardship in allowing such statements to be used in evidence in like manner as other admissions of a party to a suit, fairly made, are ordinarily admitted against them.

Whether or not this act does away with the equity juris-

diction or practice for obtaining discovery in aid of actions at law we need not decide, as no such proceeding in equity is before us. The authorities cited in the books against the idea of an abrogation of the equitable jurisdiction or practice are: Cannon *v.* McNab, 48 Ala. 99; Insurance Co. *v.* Webb, 54 Ala. 688; Buckner *v.* Ferguson, 44 Miss. 677; Millsaps *v.* Pfeiffer, *Id.* 805; Kearny *v.* Jefferies, 49 Miss. 343; Shotwell *v.* Smith, 20 N. J. Eq. 79; Hoppock *v.* United New Jersey R. & Canal Co., 27 N. J. Eq. 286; and French *v.* First Nat. Bank, 7 Ben. (U. S.) 488; while those relied on as against it are: Rindskopf *v.* Platto, 29 Fed. Rep. 130; Riopelle *v.* Doellner, 26 Mich. 102; Heath *v.* Erie R. Co., 9 Blatchf. (U. S.) 316; and Brown *v.* Swann, 10 Pet. (U. S.) 497. Assuming, even, that the statute last mentioned has superseded the right to use the equity practice, we are still satisfied that the Act of 1874, chap. 1983, *supra*, has not repealed that of 1861; and for the reason that the sole purpose of discovery under the statute, or of its prototype in equity, is not merely to obtain evidence for use upon the actual trial of the issues at law, but also to aid a party in preparing for trial. Baker *v.* Carpenter, 127 Mass. 226; Blossom *v.* Ludington, 32 Wis. 212; Wooley *v.* North London R. Co., L. R. 4 C. P. 602; Atkinson *v.* Fosbroke, L. R. 1 Q. B. 628; Wych *v.* Meal, 3 P. Wms. 310; Vermilyea *v.* Fulton Bank, 1 Paige, (N. Y.) 37; Wright *v.* Dame, 1 Metc. (Mass.) 237; Moodalay *v.* Morton, 1 Brown, Ch. 469.

Interrogatories to corporate officer.

Though the general rule in equity is that a person who has no interest in the subject-matter of the suit, or is merely a witness, cannot be made a party defendant to a bill either for relief or for purposes of discovery, there is an exception to the rule in the case of a proceeding against a corporation, for the reason that a corporation answers under its seal, and not under oath, and a full knowledge of facts might not be obtained from it. 1 Story Eq. Jur. § 150, and notes, Garr *v.* Bright, 1 Barb. (N. Y.) Ch. 157; Fenton *v.* Hughes, 7 Ves. 287; Lindsley *v.* James, 3 Coldw. (Tenn.) 477; Smith *v.* Republic L. Insurance Co., 2 Tenn. Ch. 599; Fulton Bank *v.* New York & S. Canal Co., 1 Paige, (N. Y.) 312. Hence grew up the rule of permitting the officers of a corporation to be made co-defendants for the purposes of discovery, to enable complainants to obtain full knowledge of all facts material to their action or defense. The answer of the officer could, however, not be used as evidence against the corporation, but it served only to enable the plaintiff to understand his rights, and direct his suit, action, or defense; and the plaintiff could afterwards examine the officer or servant as a wit-

ness, when the corporation could have the benefit of a cross-examination, or disprove the matters contained in his answer. Wych *v.* Meal, 3 P. Wms. 312; Vermilyea *v.* Fulton Bank, 1 Paige, (N. Y.) 37; Many *v.* Beekman Iron Co., 9 Paige, (N.Y.) 188.

The reason given for this inadmissibility of the answer of the officer as evidence against the corporation is the rule that the answer of one defendant in chancery cannot be used or is not evidence against his co-defendant; the admissions of the one do not bind the other.

Though we think the purpose of this statute was not to authorize either party to examine the opposite party or officer of the opposing corporation as to the whole case, or as to such opponent's case, but simply in support of the case or defense of the party propounding the interrogatories upon the principles governing and limiting bills of discovery in chancery (Zeigler *v.* Scott, 10 Ga. 389; Thornton *v.* Adkins, 19 Ga. 464; Goodwin *v.* Wood, 5 Ala. 152; Pritchett *v.* Munroe, 22 Ala. 501), we do not think the same rule obtains as to the use of the answers of an officer obtained under the statute. The officer answers really for the corporation, the same as any other defendant answers for himself. The interrogatories are served on the attorney of the corporation, or, if not on him, they must be served on such officer as makes it in law a legal service on the corporation. If there is any reason or "just cause" why the person called upon as an officer to answer should not answer the interrogatories, the corporation is in position to protect itself. The answer of a corporation under its seal could not, under the chancery practice, be excepted to on the ground of its insufficiency as a discovery. Smith *v.* Republic L. Ins. Co., 2 Tenn. Ch. 599. The purpose of the statute was to obtain the same discovery of a corporation as would have been obtainable in equity before in aid of a suit at law if these bodies had been required to answer under the oaths of their officers instead of under seal. If an officer answers, but not "sufficiently," the statute provides the means of compelling a sufficient answer. Corporations are no more at a disadvantage under this rule than they are from their ordinary answers in chancery, being prepared under the direction of their officers. The loyalty of officers on this line cannot be questioned so long as they tell the whole truth.

The introduction of the answers of the officers named above were objected to on four grounds: (1) It was not the proper way of bringing into court the testimony of an absent witness; (2) the defendant had no opportunity of cross-examination; (3) that Parker is not shown to be a part of the

defendant company; and (4) because, if a mere employe of the company, it is not bound by its answers in these *ex parte* depositions.

The first and second of these objections are fully answered by what has been said above. A corporation has no more right to urge the second objection than any other defendant. It acts through its officers, and not otherwise. As to the third and fourth objections it is only necessary to say that it must be presumed, in the absence of any showing to the contrary by the company, that Parker answered by and with its consent, and as its officer. There is no pretense that the interrogatories were not duly served, or that any unfair advantage or irregularity of practice was attempted against the defendant. It is true the interrogatories were not addressed to him; still the only justifiable assumption is that he was put forward by the company to answer those addressed to another and absent officer, in whose place he was acting. If he or any of these officers were of such a grade or character that they should not have answered, the objection should have been supported by some affirmative showing to that effect. Without saying more, an objection that any officer is not such a one as should have answered, comes very inopportunely when the case is on trial. It is reasonable to require that it should be made before answering, and fair practice demands that the party propounding the interrogatories should not be liable to be ensnared by an answer filed as a compliance with the statute, and an exception of this kind made upon the trial, which has been entered upon in reliance upon such answers to prove a part of his case.

Regarding the answers as evidence, and considering them in connection with other testimony bearing upon the same point, it is clear that the defendant company controlled, managed, and operated the Sanford & Lake Eustis road at the time of the fire in question. It is not necessary to set forth all the testimony on this point. To do so in this or in several other questions of fact would swell the opinion, which necessarily will be very long, beyond a tolerable measure.

Whether defendant controlled and managed the railroad.

It is asserted by appellant's counsel, however, that, barring the answers to the interrogatories for discovery, propounded by plaintiff to Larned, Deming, and Parker, there is no testimony to sustain the allegations of the declaration, upon which the plea takes issue. A concise statement of the other evidence bearing on the point will show this contention to be untenable. M. R. Moran, who was the general superin-

tendent of the defendant company from the year 1887 to March 30, 1889, says that the Sanford & Lake Eustis Railroad, from Tavares to Sanford, was operated and controlled by the defendant during those years, and on April 9, 1888, the day of the fire, to the best of his knowledge and belief; that the defendant company was not the owner of the road, and that the receipts were taken by the Sanford & Lake Eustis Company, and the expenses of the operation of the road were paid out of the moneys received from it so far as they went; that the engines, cars, and rolling stock run upon the road on the day of the fire, and prior thereto, were not in the name of the Sanford & Lake Eustis Company; and whether they were leased by said company belongs more particularly to the accounting department, and not to his, and he has no definite knowledge as to the matter. W. B. Tucker, who was agent of the defendant company at Tavares in 1888, says that the line of the road ran from Tavares to Jacksonville; that the portion of the line of which he was agent at Tavares was designated or set down on the cards as the Sanford & Lake Eustis division of the Jacksonville, Tampa & Key West Railway; that the forms in so far as the business of his office was conducted were all headed "Jacksonville, Tampa & Key West Railway Company," and he issued freight receipts and bills in the same name; that the printed through passenger tickets were headed "Jacksonville, Tampa & Key West Railway," and there was a coupon good from Tavares to Sanford printed "S. & L. E. Division;" that Jacksonville, Tampa & Key West trains were run on the division—that is, their engines were so labeled; and that an engine marked "J., T. & K. W." carried the train out on the morning of the fire; that he rendered his accounts to the auditor of the Jacksonville, Tampa & Key West Railway, and looked to that company for compensation for his services, and received compensation from the paymaster or cashier of that railway; and in receiving freights from other roads connecting with the line at Tavares he receipted for them in the name of the defendant company, and in delivering freights to such lines delivered them in the name of the same company; that the business was thus transacted during the entire time of his agency at Tavares. On cross-examination he says that during the same time he was acting superintendent of the Tavares, Apopka & Gulf, of which Maj. Alexander St. Clair-Abrams was president; and, on being asked if he knew that the cashier of the Jacksonville, Tampa & Key West was also cashier of the Sanford & Lake Eustis, replied: "He paid me off. I used to send my remittances to him from that division;" and further said that

he did not know that the cashier of the Jacksonville, Tampa & Key West was cashier of the Sanford & Lake Eustis, or how the pay rolls he signed were headed, but that he "just signed" his name. J. T. Sullivan, a witness for plaintiff, says he was a locomotive engineer on the defendant road on the morning of the fire, and ran the train that morning from Tavares to Sanford, having come into the former place with a mixed train. E. W. Dunn, another witness for the plaintiff, says he was a conductor for the defendant company on the morning of the fire, and that his run that day was from Tavares to Sanford, the making of which he describes. The testimony of Earl, the foreman boiler maker, shows that the locomotive which pulled the train that morning was one of the defendant company's locomotives.

The testimony set out above shows that the defendant company was actually operating and controlling the road. It was holding itself out to the public as the operator and controller of it. The road was managed and operated by its officers and employes, in its name, and not in the name of the Sanford & Lake Eustis, or that of any other company. The public is not required to look further than this. The statement of Moran that the "receipts were taken by the Sanford & Lake Eustis Company, and the expenses of the operation of the road were paid out of the moneys received from it so far as they went," is not inconsistent with the actual and ostensible management of the road by the defendant company, to which he testifies. He also fails to state who paid or was to pay the excess of the expenses over what such receipts "went" to pay. No secret agreement as to the application of the earnings to the expenses will protect or relieve the company actually operating the road or train from liability to those suffering injuries by its negligence.

If we look beyond the testimony set out above to that contained in the answers to interrogatories, we find the secretary of the defendant company testifying that it was operating the road "under and in accordance with a memorandum of agreement between the two companies," providing that the defendant company would operate the road until May 1, 1888, and pay the difference, if any, between the expenses and receipts of the Sanford & Lake Eustis Company, and "supply for the use of the second party" (Sanford and Lake Eustis Company) rolling stock at stated prices for the use of the same; and that 2½ per cent. of the general administration expenses of the defendant company, including its steam-boat service, should be charged as part of the operating expenses of the Sanford & Lake Eustis Company; that interest shall be reckoned at 8 per cent. on monthly balances,

and the accounts "now outstanding between the two companies shall be computed and settled upon the foregoing basis;" the agreement not to cover any advances made, or expenses incurred, by defendant company on construction account.

This agreement was made in 1887. The effect of its terms is that the defendant company should in its own right operate the road, furnishing rolling stock, and charging for the use of the same, and the 2½ per cent. of its own expenses as operating expenses. There is certainly nothing in its terms or effect that would relieve the defendant from liability as the actual operator of the road; and the fact that the memorandum agreement may not have been formally executed by the defendant or any of its officers does not do away with the potential fact that the defendant was in possession of the road, and actually operating it, as was understood by its officers, on those terms. If not on those terms, on what terms beneficial to the defendant, or relieving him from responsibility, can it be said the road was operated?

The judge charged at the request of the plaintiff:

"That a party in possession of and operating a railroad, whether a lessee or otherwise, is primarily liable for all injuries and default, and that, even if the train or engine inflicting the injury is hired to another company, if the company owning the train employs the engineer, and said train is under the control of the engineers and officers of the company hiring it, said company is liable in damages for any injury inflicted; and that the owner of the engine inflicting the injury is liable to the person injured if said engine is operated by an engineer in the employ and under the control of said owner.

Party in possession of railroad is liable for torts.

"That a company controlling and operating a railroad, and employing all the agents, servants, engineers, conductors, and other employes, and having complete control over them, and doing business in its own name, whether said company operates and controls as lessee or otherwise, such company may be regarded as the owner *pro hac vice* of the road it controls and operates."

Each of these charges were excepted to by the defendant, who requested the following charge: "If the jury believe from the evidence that the fire which destroyed the property of the plaintiff on the 9th of April, 1888, in the town of Tavares, originated from sparks emitted from an engine which left Tavares on the morning of the fire, ran over the track of the Sanford & Lake Eustis Railroad Company, and that the agents operating said engine were paid by the San-

ford & Lake Eustis Railroad Company, and were solely under the control of the Sanford & Lake Eustis Railroad Company, then the Jacksonville, Tampa & Key West Railway Company, the defendant corporation, is not responsible for the act of said agents and servants, although they may believe said agents and servants were guilty of negligence in operating said engine." This charge was refused, and the refusal excepted to.

We do not see that the judge erred either in instructing the jury as he did or in refusing to charge as he was requested by the defendant. If one railroad company operates a railroad under a lease from another, it is responsible for its negligence to persons injured thereby; and the invalidity in law of the lease is no defense to the lessee company against liability to persons suffering by its negligence. If its possession or operation of the road is, in law, unauthorized, it is no less the author of the injuries its want of care may proximately inflict upon them; and it cannot use one wrong as an excuse for or bar to liability for another which it could not have inflicted but for the first. 3 Wood, Ry. Law §§ 489, 490; Rorer, R. R. 606; Sprague *v.* Smith, 29 Vt. 421; McCluer *v.* Manchester & L. R., 13 Gray, (Mass.), 124; Wasmer *v.* Delaware, L. & W. R. Co., 80 N. Y. 212; 1 Am. & Eng. R. Cas. 122; Clary *v.* Iowa Midland R. Co., 37 Iowa, 344; Pittsburg, C. & St. L. R. Co. *v.* Campbell, 86 Ill. 443; Doolan *v.* Directors, etc., L. R., 2 App. Cas. 792. In Sprague *v.* Smith, 29 Vt. 421, where trustees of mortgage bonds had taken possession of a railroad on account of default in payment of interest, and at the request of the company, and a question was whether the defendants were personally liable upon contracts made by the operators upon the road or for their negligence or misconduct, while the defendants continued to operate the road and to receive freight and pay for passengers for the benefit of the *cestuis que trustent*, Judge REDFIELD, speaking for the court, and after remarking that lessees are liable to the same extent as the lessors would be, says: "Indeed, there can be no question, we think, that a mere intruder into the franchises of a railway corporation, who should continue to use it for his own benefit, would be liable to passengers and the owners of freight who should employ him, to the same extent precisely as the company itself, while continuing the same business. Any other view of the liability of such intruder would be to allow him to allege his wrong in his defense; and we can see no reason why the defendants are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees or any others exercising the

franchises of the company for the time must be; that is, they are the ostensible parties who appear to the public to be exercising the franchises of the company. It would be perplexing in the extreme to require strangers suffering injury through the negligence of operatives under the defendant's control to look beyond the party exercising such control. The party having this independent control is generally liable for the acts of those under such control, whether of contract or tort." In Hall *v.* Brown, 54 N. H. 495, the defendants, owners of a private railroad, were, with the consent of a railroad corporation, accustomed to run their cars and engines over a part of the track of the corporation, including a highway crossing; and it was held that, while thus in occupation of the track, they were to be considered proprietors of the railroad of the corporation, under a statute providing that no such "proprietors" should obstruct by their engine, cars, or train any highway, under a certain penalty. See, also, Tracy *v.* Troy & B. R. Co., 38 N. Y. 433. And in McCluer *v.* Manchester & L. R. Co., 13 Gray (Mass.), 124, the decision was that parol evidence that a railroad corporation established by law in another state has held itself out through its agents as a common carrier over a railroad in Massachusetts, is sufficient *prima facie* evidence of its capacity to contract for such carriage to maintain an action against it for the loss of merchandise intrusted to it.

The defendant company was in possession and operation of the road, and the train was under the control and management of its officers and agents; and whether we consider or exclude from our consideration the memorandum, and whether the possession was rightful or wrongful, and whether the agreement of lease was valid or invalid, the company is liable. There is nothing in the authorities or the charge of the court inconsistent with this view.

II. There is testimony to the effect that on the morning of April 9, 1888, as a train of cars drawn by a locomotive of the defendant company started from Tavares, a large quantity of sparks, cinders, and coals were emitted from the smoke-stack of the engine, and fell on the ground and sidewalk in front of buildings facing on the street or boulevard which intervened between these buildings and the railroad track, and in one instance inside of one of the buildings from nearly opposite to which the train started, setting fire in a number of places to sawdust on the street near a pine wood sidewalk, which was adjacent to the buildings, and to trash which had collected under the sidewalk, and to some paper on a case of goods in the particular building referred to; and the sidewalk, which was

Facts as to setting out fire.

elevated a few inches from the ground, caught fire, and the fire was communicated under and to one of the stores, and thence to other buildings, including those of the plaintiff, whose buildings, constructed of pine wood, together with its personal property described in the declaration, were entirely consumed. That a very strong wind, incident in that section of the country to the season, was blowing at the time in the general direction in which plaintiff's buildings lay from where the fire was set out. The fire in the sawdust was suppressed in a number of places, but whatever efforts were made as to that in the sidewalk were ineffectual; and, the flames spreading with great rapidity, nearly the entire town was destroyed within, according to the great preponderance of the testimony, one hour. It is testified by one witness that some of the coals were as large as three quarters of an inch long by a quarter of an inch wide, and by another that they were as large as the end of his little finger. and by another that they were the size of his finger nail, and by another they were a quarter of an inch long; and they are also described as being burning coals when they fell. There are other witnesses who do not describe the sparks as being large, yet testify to seeing them, and their setting out the fire; and some witnesses who saw this much do not connect the sparks with defendant's engine. The engine did not leave on time, but there is a conflict as to the time it was behind; the plaintiff's witnesses putting it at as much as 40 minutes, and the defendant's about 15 minutes, leaving Tavares about 7:45 A. M. Plaintiff's witnesses say that the engine started off with a sudden jerk, and moved at a very great speed.

Condition and management of engine.

The testimony of certain witnesses of the defendant,.(the conductor, engineer, firemen, and foreman boiler maker,) without stating what point each or any of them has testified to, is to the effect that on the morning in question a "mixed train" came into Tavares, and, the freight cars being thrown off, the engine, which was numbered 12, went around the "Y" with the baggage and passenger coach, took water, and returned to the platform, when the engineer oiled up, and, on signal from the conductor, the train pulled out on its way to Sanford, going as the speed of about three or four miles an hour until it got beyond the limits of the town; not starting at this speed, however, nor with a jerk, but as ordinarily, the engineer opening his throttle enough to start the train, or probably some two, three, or four of its twenty-five or thirty notches. That the fire was made of light wood, without bark, and was a "fresh" or "green" fire; the fire box being full, filled

while the engineer was oiling up to start out; and that such a fire makes a heavy, dark smoke; and that with such a fire an engine does not throw sparks. That the engine was an extension front engine, and in first class repair at the time; and that the spark arrester was a Cook arrester, a very good arrester and as good as any in general use in extension front engines, and in perfect order, and all the appliances of the engine were in good repair when the engine left the shops of the company about the last of March preceding the fire, having been put in that condition then. That the dampers were closed, and the spark arrester was in proper position; and that it would not be possible to move a spark arrester while the engine was hot. That the slide or door of the spark-arrester, which slide or door is about 8 or 10 by 14 inches in size, was closed at the time the train started from, as it was on its arrival that morning at, Tavares, and that this was indicated or shown by the handle to the rod of the door or slide, which handle is in full view of the engineer and fireman, was almost perpendicular downward, and had a pin on a chain to hold it in position, which pin was in its hole or proper place. That to open the door the handle had to be thrown up, the door working on an axis. That the spark arrester was examined the next afternoon, and found to be in position, and sound condition, there being no holes in the netting, and did not look as if it had been tampered with. That the construction of the door or slide was such as to have a tendency to keep it closed, independent of the pin on the outside for that purpose. That the handle weighed four pounds, and that it would require a pretty good jerk sometimes, and especially when the engine was hot, to open the slide. That he does not see how there could be any movement of the door, even if the pin should be out, during the running of the engine. To cause it to oscillate would take a pretty good jerk of the engine. That it might do so if the engine should leave the track, but not otherwise. That part of the netting of the spark arrester had meshes an eighth of an inch square, and the other part was of smaller meshes. The engineer states that, if coal or cinders three-quarters of an inch long should come from an extension front engine, it would indicate that the spark arrester was in bad order, and that the emission of such sparks would probably occur if the engine was working hard; that, if the spark arrester was closed, and the netting in perfect condition, it would not have been possible for sparks of the size of a finger nail—three-quarters of an inch long—to have escaped from the engine. The foreman boiler maker says that, if the netting was in good order, etc,, the sparks of the large size indicated.

could not have passed through the netting. The conductor says he did not notice any sparks from the engine; that he was standing in the door of the baggage car, with Maj. St. Clair-Abrams, looking towards the town.

It is insisted by defendant that the burden of proving negligence, which burden is on the plaintiff, is not met by showing the mere fact of the setting out of fires by sparks emitted from the defendant's engine, but that he must go further, and prove that the sparks were emitted negligently, which negligent emission, it is admitted, may be proved by circumstances of a character to raise a presumption of negligence, which presumption, however, may be successfuliy rebutted: and defendant insists that, even if plaintiff's testimony is sufficient to raise such a presumption of negligence by defendant, it has been successfully rebutted by the latter in proving due care on its part in handling the engine, and that the engine was fitted with proper appliances for arresting sparks, and that they were in proper order and condition.

Burden of proving negligence—Presumption

The trial judge refused the plaintiff's request of a charge containing the proposition that, if the jury were satisfied from the evidence that sparks came from the locomotive and caused the fire, which, spreading, destroyed plaintiff's property, the burden of proof rests on the defendant to show that he was not negligent; but, on the contrary, he instructed them in accordance with the view requiring the plaintiff to prove that the fire was set out by the defendant negligently or through some default of duty or proper care on its part. Whart. Neg. § 870; Shear. & R. Neg. §§ 57–60; Pierce, R. R. 437, 438; 1 Redf. R. R. 476; 2 Rorer, R. R. 796; Savannah, F. & W. R. Co. *v.* Geiger, 21 Fla. 669, 29 Am. & Eng. R. Cas. 274; Jennings *v.* Pennsylvania R. Co., 93 Pa. St. 337; Frankford & B. T. Co. *v.* Philadelphia & T. R. Co., 54 Pa. St. 345.

That negligence may be proved circumstantially there can be no doubt, either in reason or upon authority. Atchison, T. & S. F. R. Co. *v.* Bales, 16 Kan. 252; Philadelphia & R. R. Co. *v.* Schultz, 93 Pa. St. 344. The fact that no instrument has yet been found which entirely prevents the escape of sparks from locomotives, seems, when coupled with the fact that the use of these engines is both lawful and eminently useful, a sound reason for the reason for the view that the mere emission of sparks, or the simple setting out of fires thereby, is not *per se* evidence of negligence, and will not throw upon the defendant the burden of removing such presumption; but when the circumstances of the emission are such as common experience or the known

efficiency of approved spark-arresters in general use tells us would not exist if such instruments are properly used, such circumstances, of themselves, suggest negligence. Shear. & R. Neg. §§ 59, 60; Whart. Neg. § 871; Wood, Ry. Law, 1348, 1349; Garrett *v.* Chicago & N. W. R. Co., 36 Iowa, 121; Philadelphia & R. R. Co. *v.* Schultz, *supra*. Where the sparks are unusual in size, or both of unusual size and in unusual quantity, the inference of negligence arises. Jackson *v.* Chicago & N. W. R. Co., 31 Iowa, 176. In Hull *v.* Sacramento Valley R. Co., 14 Cal. 388, the fact that fire was communicated to plaintiff's grain from defendant's engine, with proof that this result was not probable from the ordinary working of the engine, was held sufficient *prima facie* proof of negligence to carry the case to the jury. Henry *v.* Southern Pac. R. Co., 50 Cal. 176; Ellis *v.* Railroad Co., 2 Ired. (N. Car.) 140; Herring *v.* Wilmington & R. R. Co., 10 Ired. (N. Car.) 402. In Huyett *v.* Philadelphia & R. R. Co., 23 Pa. St. 373, it was shown that the weather was very dry and windy, the wind blowing strong across the road towards plaintiff's house, which was seventy-seven feet from the railroad track. Sparks were seen flying from the engine to the distance of more than fifty yards, and farms and fields were set on fire about the same time, and at considerable distance from the road; the defendant's evidence showing that the engines were in good order, and all provided with good spark catchers; that they flew most when the door was open, and the fire stirred, and considerably in firing up. The lower court directed a verdict for defendant, but it was reversed on appeal, where it was held that the question of defendant's negligence was one for the jury to decide. Gagg *v.* Vetter, 41 Ind. 228; Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373.

The testimony in behalf of the plaintiff shows an extraordinary escape of sparks, both in quantity and size. The witnesses who testify to this are numerous, and the terms in which they describe them cannot fail to impress any one if the facts were as represented by them, that the emission of sparks was in all respects far in excess of anything likely to occur in the ordinary operation of a locomotive duly supplied with modern appliances approved by the test of use, and properly managed by competent operatives. This testimony was of itself, to say no more now, sufficient to raise a presumption of negligence upon the part of the defendant, and throw the burden of proof of care upon it. The railroad company does not present any affirmative testimony that sparks were not emitted as asserted by the witnesses of plaintiff, but its

Rebuttal of presumption of negligence.

main reliance on this point is on the evidence that the engine was in good condition, supplied with proper appliances, and properly managed. In considering this point, we shall assume that the testimony of defendant's witnesses is to the effect that the engine was perfect in all its parts and appliances, and its management unequaled; yet, after doing this, the law governing the case will not permit us to disturb the finding of the jury in so far as it imputes negligence to the defendant.

In Brushberg *v.* Milwaukee, L. S. & W. R. Co., 55 Wis. 106, 7 Am. & Eng. R. Cas. 505, the issue was whether the fire which destroyed plaintiff's barn was caused by the negligence of the railway company. The defendant's evidence was that the engine was perfect in all respects, and supplied with all suitable appliances for preventing the escape of sparks, and run in a careful manner, and that the spark-arrester and fire-box were both closed so that no dangerous sparks or fire could escape; and the testimony of the plaintiff was not only that the barn was found on fire after the engine passed, but that when passing it the engine was emitting sparks in great numbers, and coals an inch or more long; that some of these struck the barn and some went under it; that coals of a similar size were seen immediately after on the track and beside the track in the immediate vicinity of the barn, and that several stumps, a short distance from the barn, and near the track, were also found on fire soon after: and the officers of the company testified that, if the engine had been properly run and cared for, no coals of the size described could have escaped. The jury found for the plaintiff, and the judgment was affirmed on an appeal taken by the railroad company. Alluding to the testimony in behalf of the plaintiff as to the large coals and cinders, and their being carried by the wind to and under the barn, and that the barn was on fire a few minutes after the train had passed, it is said in the opinion that there certainly was evidence to go to the jury, not only as to whether the fire was communicated to the barn, but also whether the engine was properly managed and run at the time, though it be admitted that the evidence on the part of the company was conclusive that the engine was properly constructed and furnished with the most approved appliances for preventing the escape of sparks, coals, and cinders; that, if the engine was properly constructed and handled, it would not and could not have emitted coals and cinders of the size indicated, and therefore it became a question of veracity between plaintiff's witnesses and those of defendant, and this question was one which had to be de-

termined by the jury, and which the court could not determine. Referring to the cases of Spaulding *v.* Chicago & N. W. R. Co., 33 Wis. 582, and Read *v.* Morse, 34 Wis. 315, (the former of which is relied on by the appellant before us,) it is further said: "Had the plaintiff's proofs gone no further than to show that sparks escaped from the engine and were carried by the wind as indicated, without showing the escape of coals and cinders of an unusual size, the proof offered by the defendant might have been sufficient to rebut the presumption of negligence on the part of the employes arising from the fact that such sparks ignited the barn, and put the case within the rulings of the two cases referred to."

In Atchison, T. & S. F. Co. *v.* Bales, 16 Kan. 252, the defendant's proof was that the engine was of the first class, in good order and condition, and operated by a careful and skillful engineer, to the best of his knowledge and ability; and the plaintiff proved that the same engine, on the day of the alleged fire, caused a large number of fires,—a dozen or more,—but that other engines operated over the same track on the same day and before and since did not produce any such results. "Now," says the opinion, "it would seem to us that such evidence would lead irresistibly to the conclusion that there was negligence somewhere. Of course it would not locate the negligence, or show whether the fault was with the engine or the engineer. * * * Now, when the jury found that the engine was good and in proper condition, then they had to weigh the foregoing circumstantial evidence with the direct testimony of the engineer, who testified that he managed the engine skillfully and carefully. If they believed from all the circumstances of the case that the testimony of the engineer was wholly unworthy of belief, they had the undoubted right to so find, and entirely disregard it, and to say that the circumstantial evidence of the plaintiff tending to prove negligence immeasurably outweighed the direct and positive testimony of the defendant declaring there was no negligence. The court could not weigh the evidence."

In Philadelphia & R. R. Co. *v.* Schultz, 93 Pa. St. 341, there was testimony that the engine was furnished with an approved spark-arrester, and was examined on the day of the fire, when it was found to be in good condition, and that it so continued for months afterwards. "Unfortunately for the defendant," says the court, "the plaintiff furnishes abundant proof that the engine in question either was not furnished with the necessary spark-arresting appliances, or, if

so, they had been tampered with by the persons in charge of the same. On any other theory it is unaccountable that this locomotive alone, of all run on the road, should have fired the country through which it passed almost daily for the period of two weeks, and that it should have become so notorious in this respect that, as one of the witnesses says, 'We watched for that train every day, so that we might be ready to put out fires.' Moreover, two of plaintiff's witnesses say that this engine threw out sparks as large as a hickory nut; and there is the further significant testimony that shortly after the Schultz fire this locomotive ceased to be dangerous; or, as one of the witnesses said: 'After this we had a rest.'" See, also, St. Louis, A. & T. H. R. Co. *v.* Gilham, 39 Ill. 455; Webb *v.* Rome, W. & O. R. Co., 49 N. Y. 420; Philadelphia & R. R. Co. *v.* Hendrickson, 80 Pa. St. 182; Illinois Cent. Co. *v.* McClelland, 42 Ill. 355; Huyett *v.* Philadelphia & R. R. Co., 23 Pa. St. 373.

The application of these authorities to the testimony of the case before us is patent. An inspection of the piece of the netting in evidence, with meshes one-eighth of an inch square, is, to say nothing of the testimony of the engineer and foreman boiler-maker, enough to satisfy any one that the larger coals could not have passed through the arrester if the door had been kept closed, or the arrester in proper condition. This impossibility rendered the testimony of the plaintiff's witnesses and that in behalf of the defendant on the subject of the engine's having a spark-arrester, or, admitting that it had one, of its proper management, and hence, on the issue of negligence *vel non*, absolutely irreconcilable; and it made a question of credibility of witnesses, the decision of which the law remitted to the jury, who have settled it in favor of the plaintiff; and, under the jurisprudence governing us, this court cannot interfere, whatever may be its view as to the correctness of their judgment. There is nothing in any case cited by the appellant that is inconsistent with these conclusions.

It is urged, under this head, that certain charges given to the jury were erroneous. These are the 3d, 14th, 19th, 20th, 22d, and 23d. The objection urged against the 20th charge is, it affirms that the defendants were required to exercise the "utmost care," under the circumstances indicated in the charge. The authorities relied upon in support of the objection are: Whart. Neg. § 869; Frankford & B. T. Co. *v.* Philadelphia & T. R. Co., 54 Pa. St. 345; Michigan Cent. R. Co. *v.* Anderson, 20 Mich. 244; Kansas Pac. R. Co. *v.* Butts, 7 Kan. 308. The first of these authorities, as far as ap-

Instructions — Degree of care required by company — "Utmost care."

plicable, calls for "the diligence good specialists in this department are accustomed to exercise," and for the exercise of "every precaution * * * to prevent injury." In the Pennsylvania case the plaintiff's bridge had been constructed long before the railroad, and was destroyed by fire set out by the locomotive of a passing train. The track was about 150 feet from one end of the bridge and 300 feet from the other; and the nearest depot stood about 400 yards from the bridge. The plaintiff's contention was, in so far as the case need be noticed now, that the station should not have been placed so near the bridge, and that the bridge should not have been passed by the locomotive under steam. It was shown by the testimony that an engine under ordinary headway would run 600 feet with the steam shut off, but that stopping at the station required that steam be put on to run over defendant's bridge over the same creek that plaintiff's bridge spanned. There was no evidence as to any unusual emission of sparks, either in quantity or size. The doctrine of the case announced, as abundantly supported by authorities adduced on both sides, is that, there being in the charter of the company no prescribed limit of approach towards buildings and bridges, it could locate its road and station on such route and at such points as in the judgment of the directors would be beneficial to the interest of the corporation and the public; that, in the absence of proof of a special motive to do injury, we must presume that the location was made for proper ends, and not to do injury; that the proximity of the station and of the line of the road to the plaintiff's bridge could not, in itself, be considered a ground of legal liability, but an element only in ascertaining the degree of reasonable care to be used under the circumstances; that the law, in conferring the right to use an element of danger, protects the person using it, except for an abuse of his privilege, and that in proportion to the danger to others will arise the degree of care and caution to be used in exercising the privilege; that great danger demands higher vigilance and more efficient means to secure safety; where the peril is small, less will suffice; that it is undoubtedly the duty of a railroad company using such dangerous machines, fired by intense heat, and running in close proximity to our houses and valuable buildings, to use the utmost vigilance and foresight to avoid injury; that it is the duty of those using these hazardous agencies to control them carefully, and adopt every known safeguard, and to avail themselves from time to time of every approved invention to lessen their danger to others; that questions of skill, vigilance, care, and proper management in any business are necessarily questions of fact,

depending upon the circumstances of each case, and are to be referred to a jury; what is care in one case may be negligence in another, where the danger is greater and more care is required; that, as the degree of care has no legal standard, but is measured by the facts that arise, it is reasonable that such care must be required as it is shown is ordinarily sufficient, under similar circumstances, to avoid the danger, and secure the safety needed; and, therefore, that ordinary care is the only rule that can be stated by a court; and that which is ordinary care in the case of extraordinary danger would be extraordinary care in a case of ordinary danger; and that which would be ordinary care in a case of ordinary danger would be less than ordinary care in a case of extraordinary danger. Holding these views, the court said it could not controvert the proposition of the turnpike company that it is the duty of railroad companies to adopt the best precautions against danger in use; and it is not sufficient for them to exercise what, under circumstances of less risk, would be ordinary care. It was held, however, that the trial judge had not violated these principles in his charges. The conclusion of the court upon the point was that to hold it improper to stop at the station, and that steam must be shut off in passing by the bridge, would be to abridge the proper and ordinary use of the road; that the injury in the case did not arise from any special act of negligence, but from a customary and lawful use of the road; that such use would, however, not justify stopping to blow off steam through the mud-valves at a common crossing, where many horses pass, or are frightened by the noise, or stopping in a high wind opposite a new house in the process of building, where the burning cinders and sparks are carried through the open door by the wind; that negligence has been defined to be the absence of care according to the circumstances, but that it had never been held that steam must be shut off in passing even in close proximity to dwellings, though many miles of railroad run within a few feet of valuable houses, mills, and manufactories, and, indeed, through towns and cities.

The Michigan case is one in which the plaintiff's building was destroyed by fire communicated by sparks flying from defendant's engine. The lower court, says the opinion, "charged the jury that regard must be had to the actual state of things at the time, the force and direction of the wind, dryness of the weather, and proximity of the building to the railroad; and that what might be ordinary care on a still and wet day might not be on a windy and dry one, and when near combustible matter; the question still being what care a prudent man would exercise in precisely similar cir-

cumstances." There had been full testimony upon the character of the engines and stacks, and the use of the proper means to render them as secure as possible from doing mischief by the discharge of sparks, and this charge was independent of any question as to the quality and character of the equipments as suitable to be used. This rule was held to be incorrect, the supreme court saying that railroad trains cannot deviate from their track, and must make schedule time, not only for purposes of business, but for consideration for human life; and that those who establish themselves in the neighborhood of railroads must know that trains are expected to run with regularity, and, if there are special risks, arising from no want of care in the proper equipment and management of engines and trains, those risks are not chargeable to the railroad, but are incidental to the situation, and the extra care they demand devolves upon the other party, and the consequence of his not exercising it must fall upon him, because the railroad is not in fault. The Kansas decision merely decides that, where the fire escapes owing to high winds, and no negligence or want of care upon the part of the railroad company, the latter is not responsible.

There is nothing in any of these authorities that requires us to hold the use of the word "utmost" to be fatal to the charge. The Pennsylvania court uses the same expression asserted here as being objectionable in the charge. Nothing need be said of the section in Wharton's work, nor of the Kansas case; and we think that the meaning of the Michigan decision is the same as that in Kansas, which is that, where there is no negligence upon the part of the railroad, it is not liable for damages attributable solely to the wind, —damage which the exercise of proper care was unable to avoid. In neither of them was the *locus* of the injury in a village or town.

In Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, the charge was that less care is required of railroad companies, while running their trains in the country, where there is no property near their track, exposed to fire, than in a village, where wooden buildings are situated so near their road as to be exposed to fire from the locomotive, and at a time when the wind is blowing in a direction from the engine towards the buildings; and that, under such circumstances, they are bound to use the utmost care; and if, from the want of such care, fire is communicated to such buildings, and they are consumed, the company will be liable, in the absence of contributory negligence upon the part of the owners; and the ruling was affirmed by the court of appeals, it observ-

ing that a much higher degree of care, both in respect to the rate of speed, and the watchfulness to prevent casualties, should manifestly be required when trains are passing through or remaining stationary in the streets of a city or densely populated village; and that it was not stretching the rule unduly to say that under such circumstances the railroad company is bound to use the utmost care to guard against the damages which obviously attend such a condition. "The substance of the charge, without criticising its terms with too great nicety, is that the care must be proportioned to the danger of accidents, and that, where there is great danger, there must be a corresponding degree of care." See, also, Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 270, 299, and Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 469, 470.

In view of the New York and Pennsylvania cases, we do not say and do not think there was error in the use of the word "utmost" in the twentieth charge; and there is nothing in the authorities cited by appellant, or in any falling under our notice, that is inconsistent with this conclusion. Moreover, this charge distinctly affirms that the degree of care required is to be proportioned to the danger to be apprehended of inflicting injury to the person or property of others, by which we understand the judge announced the same doctrine as is announced in the opinions in the two cases referred to, which, in other words, is that the degree of care is to be measured by or according to the facts that arise, or in proportion to the danger, and with which rule the use of the word "utmost," as defining the care required in a case where circumstances are like those existing in the one at bar, is not inconsistent. We fail now to conceive a case likely to occur in the natural course of things that would call for a higher degree of care against damage by fire than the circumstances of the one before us called for.

Duty of company to adopt improved appliances.

In one of these charges it is said that the engine must have the "most approved appliances" to prevent the escape of sparks; and another, that a railroad company should provide engines with "modern appliances." In another, the twenty-third, the view announced is that the engine must have been supplied with a spark-arrester of the best mechanical invention and construction in general use at the time." These charges were all given at the request of the plaintiff. Instructions given at the request of the defendant are, in so far as they relate to the character of the appliances, as follows: "That it is not negligence to run an engine which emits sparks, provided

the company use machinery equipped with such spark-arresters and mechanical contrivances as are the best generally known and in use in the country for the prevention of the escape of sparks, and that are approved by experienced railroad operators." That the company is only required "to avail itself of the best mechanical contrivances which had been tested and put in general use at the time of the fire for preventing the burning of the property of others, but it is not required to use every possible contrivance, although patented, and recommended in scientific "discussions;" and the engine shall be supplied "with a spark-arrester of the best mechanical invention and construction in general use at the time," or, as in still another, or fourth, charge on the subject, one "of the most approved style in general use."

The language of the twenty-third charge is excepted to as too stringent. Of the six authorities cited by counsel for appellant on this point, we have access to Whart. Neg. § 872; Frankford & B. T. Co. *v.* Philadelphia & T. R. Co., 54 Pa. St. 345; Steinweg *v.* Erie R. Co., 43 N. Y. 123; Jeffries *v.* Philadelphia, etc. R. Co., 3 Houst. (Del.) 447. These authorities, taking them in their order, hold, the first, that a company cannot be required to use the "most perfect possible contrivances to prevent the escape of sparks," and, until the contrivance "has been accepted in general use, a company cannot be charged with negligence in not adopting it;" the second, that it is the duty of the company "to avail themselves from time to time of every approved invention to lessen" the danger; the third, that it should use any improvements known to practical men, and which has actually been put into practical use, but a failure to take every possible precaution which the highest scientific skill might suggest, or to adopt an untried machine or mode of construction, is not, of itself, negligence; and the fourth, that engines should be supplied "with such spark catchers as were then in general use."

The charge excepted to, considered alone, or in connection with the others, does not violate these authorities. The several instructions set forth the law correctly and in accordance with the current of authority.

III.—The defense of contributory negligence is asserted in the fifth plea, and it is attempted to maintain it by evidence which tends to show that there was an accumulation of trash in the streets and under the sidewalk where the fire was set out, and under the store or building of Lester, to which it communicated, and from which it spread to other buildings, including those of the plaintiff. There is nothing in the

Contributory negligence—Negligence of third person immaterial.

record that connects the plaintiff in ownership or control of the street or sidewalk where the fire was set out, or of the Lester premises, or in responsibility of any kind for their condition; yet it is contended that, as the owner or keeper of the Lester premises, and the authorities of the town of Tavares, were negligent, and thereby they contributed to whatever injury they respectively may have sustained, and could not recover damages of the defendant, the plaintiff cannot be in a better position than they would be. Assuming, for argument's sake, that Lester and the town authorities were culpably negligent, and that such negligence was contributory to any injury they may have sustained by the fire, that neither of them could recover for it, and that but for their negligence the fire would not have communicated to plaintiff's property, there is yet no benefit to be found for the defendant in such an assumption. Lester and the town authorities are entire strangers to the plaintiff; and the fault of a mere stranger, however much it may contribute to the injury, is no defense for one whose negligence is the proximate cause of the injury. The fact that both the defendant and the stranger may be liable to the plaintiff is not a defense for either. Cooley, Torts, 684; Shear. & R. Neg. §§ 61, 65, 66; Small *v.* Chicago, R. I. & P. R. Co., 55 Iowa, 582, North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Eaton *v.* Boston & L. R. Co., 11 Allen, (Mass.) 500; Lane *v.* Atlantic Works, 107 Mass. 104; Martin *v.* North Star Iron-Works, 31 Minn. 407, 15 Am. & Eng. R. Cas. 156; Hunt *v.* Missouri R. Co., 14 Mo. App. 160; Atkinson *v.* Goodrich Transportation Co., 60 Wis. 141; Paulmier *v.* Erie R. Co., 34 N. J. Law, 151; Lake *v.* Milliken, 62 Me. 240; Sullivan *v.* Philadelphia & R. R. Co., 30 Pa. St. 234; Sheridan *v.* Brooklyn & N. R. Co., 36 N. Y. 39; Webster *v.* Hudson River R. Co., 38 N. Y. 260; Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470.

The charges of the judge to the jury on this point are complained of as excluding entirely from the latter the consideration of the evidence showing the condition of the streets and sidewalk; that it was a question for the jury to say whether this condition of the streets constituted contributory negligence; but the court determined this question itself, by deciding that no act or omission of that kind constituted contributory negligence. The charges on this particular point, to which appellant has objected, are the sixth, given at plaintiff's request, and the fourth, given by the judge of his own motion.

These charges are as follows: "(6) That the plaintiff is not charged with the duty of keeping the streets or the sidewalks of the town in good condition or free from trash; that

the fact that there was trash in the streets or under the sidewalks, or that the sidewalks were made of inflammable material, does not constitute contributory negligence, so as to prevent plaintiff from recovering; that contributory negligence to prevent recovery must be some omission of duty which the plaintiff was compelled to perform, or some act by him concurring in the destruction of his property; that the owner of property is not compelled to keep his property in such a condition as to guard against the negligence of a railroad company."

"(4) The contributory negligence of the plaintiff, in order to defeat a recovery, must be such as contributed as a proximate cause to the occurrence from which the damage arose; and it must be the negligence of the plaintiff, his agents, servants, or employes, and not that of third persons, and the burden is on the defendant to prove it, unless disclosed by plaintiff's testimony."

"(15) That to charge the plaintiff with contributory negligence defendant must show by affirmative testimony that the plaintiff did something, or failed to do something, which it was the duty of the plaintiff to do or not to do, that concurred in causing the fire or the spread of the fire to plaintiff's property, and which tended to produce the destruction thereof, and that the burden of proof is on the defendant to show such contributory negligence."

The charges, considered as bearing upon the negligence of the town authorities and Lester, are, in the light of the testimony, which fails entirely to show any privity or responsibility of plaintiff with or on account of either of them, entirely in consonance with the law as we find it written in the books. Had the judge submitted to the judgment of the jury the question as to whether the contributory negligence of a stranger is a defense to plaintiff's action against a negligent defendant, he would have grievously renounced, for the time, his own proper function of instructing the jury as to the law of the case, and made them, instead of the court, judges of the law.

There is nothing in the authorities cited by appellant—Pierce, R. R. 434; Coates *v.* Missouri, K. & T. R. Co., 61 Mo. 38; Ohio & M. R. Co. *v.* Shanefelt, 47 Ill. 497; Chicago & N. W. R. Co. *v.* Simonson, 54 Ill. 504: Murphy *v.* Chicago & N. W. R. Co., 45 Wis. 222; Kesee *v.* Chicago & N. W. R. Co., 30 Iowa, 78; Kansas Pac. R. Co. *v.* Brady, 17 Kan. 380—that in any way conflicts, on this point, with those we have given above. Counsel have overlooked the distinction made by the law between the negligence of the plaintiff and that of a stranger to him.

That the plaintiff was not bound to keep guard against the negligence of the defendant, but has the right to enjoy his property in the ordinary manner, and that, while he is charged with the duty of saving his property from destruction, if it can be saved, he is under no obligation to stand guard over it, continuously watching it, to protect it from the negligence of the defendant, is a proposition of law too clearly correct to admit of any controversy, and nothing in the authorities cited by appellant question it; and the same is true of the charge that the fact that the plaintiff's property was exposed to the reach of sparks of a locomotive engine is no defense to an action of this kind, and the plaintiff has the right to construct his buildings on any part of his property, and to enjoy the same without rendering himself liable to the negligence of the defendant.

There was no error in the fifteenth charge. Louisville & N. R. Co. *v.* Yniestra, 21 Fla. 700, 29 Am. & Eng. R. Cas. 297. Neither the plaintiff's nor the defendant's evidence shows any contributory negligence.

IV. The appellant also assigns as error the refusal of the judge to give the following charges, requested by it; "That, if the jury believe from the evidence that at the time of the fire plaintiff's property, or any part of it, was in the possession of a lessee or tenant of the plaintiff, and that, by the exercise of the ordinary prudence and care under the circumstances then existing, the said lessee or tenant might have saved or preserved from destruction the property of the plaintiff, or any part of it, then the plaintiff cannot recover damages for the destruction of the property, or that part of it which might have been saved, even though the defendant were guilty of negligence in setting out the fire which caused the destruction of the plaintiff's property."

Contributory negligence of plaintiff's lessee.

"That, if the jury believe from the evidence that at the time of the fire the property of the plaintiff, or any part of it, was in the hands of a tenant or a lessee of the plaintiff, the relation of such tenant or lessee to the property is such as to require him to take reasonable care to prevent damage and loss of said property; and if they believe from the evidence that the property of the plaintiff, or any part of it, at the time it was destroyed, was in the possession or control of said lessee or tenant, and that he failed or neglected to save said property, or any part of it, from destruction, which he could have done by reasonable care and diligence,—then the plaintiff cannot recover from the defendant for that part of the property destroyed in consequence of said failure or neglect."

Contributory negligence, as it is defined by the books, must emanate from the plaintiff or from some person for whose act he is responsible. Shear. & R. Neg. § 61. In the case of Bartlett *v.* Boston Gas Light Co., 117 Mass. 533, cited by appellant, it was held that the owner of a house could not maintain an action against a gaslight company for an injury to his reversionary interest, caused by the negligence of the company in permitting gas to escape into the house, if the immediate cause of the injury was the explosion by the negligence of the tenant in possession of the house. The tenant having smelled gas during the night, went into the basement with a lighted candle, and the gas ignited from the candle flame, and an explosion took place. The explosion would not have occurred but for this reckless or negligent conduct of the tenant, and the conclusion of the court as to the absence of right of the plaintiff to recover was held to rest, not upon the ground of any personal relation of agency between the landlord and his tenant, but upon the relation of the latter to the property, as having the present control and charge of it, and therefore being the one upon whom devolved the duty to take reasonable care to prevent damage.

We are not prepared to say that the charges requested would not have been proper if there was testimony in the record to support them. But if they would be proper under the circumstances stated, we find that the only affirmative testimony directed to the conduct of the lessee of the hotel shows that he did endeavor to save, and actually did save, some of the personal property in the hotel. Not only can it not be said that he was negligent in not saving other personal property than that which was actually saved, but there is not in the record sufficient testimony to have enabled a jury to say that any particular property destroyed could have been saved by him. The testimony should at least go to the extent of identifying the property which might have been saved by the exercise of proper diligence or care, so as to enable the jury to fix the amount of reduction of damages on account of such negligence. St. Louis, I. M. & S. R. Co. *v.* Hecht, 38 Ark. 357, 9 Am. & Eng. R. Cas. 222; Toledo, P. & W. R. Co. *v.* Pindar, 53 Ill. 447; Chicago & A. R. Co. *v.* Pennell, 94 Ill. 448; Bartlett *v.* Boston Gaslight Co., 117 Mass. 533; 2 Rorer, R. R. 793; Taylor, Landl. & Ten. § 196. The rejection of the charges, assuming them to announce correct abstract propositions of law, was immaterial to the defendant, considering the testimony before us. Whether there should be a plea setting up the neg

ligence of the lessee is a question which suggests itself, but is not material to be passed on.

What has been said covers also that part of the fifteenth charge bearing on the same point.

V. Appellant's counsel insist "that the questions propounded to the witnesses A. N. Lester, J. S. Erman, *et al.*, by plaintiff, as appears from the 8th to the 102d ground, inclusive, of the assignment of errors, were leading, and sought to elicit testimony which was incompetent and irrelevant, and that the court erred in overruling defendant's objection thereto;" and they say "these objections are manifest on the face of the questions," and they "submit them without argument." There are 147 assignments of error, of which a half dozen are expressly abandoned in this court. We have perceived no such infractions of the rules invoked as calls upon an appellate court for interference, and we feel that counsel would have pointed out the same if they had detected them.

Evidence as to other fires.

The authorities hold that, where it is shown, as it is in this case, that the fatal fire has been set out from a designated engine, it is admissible to introduce evidence of other fires previously set out by the same engine, but not by any other engine of the defendant company. Ireland *v.* Cincinnati, W. & M. R. Co., 79 Mich 163; Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227; Brighthope R. Co. *v.* Rogers, 76 Va. 443, 8 Am. & Eng. R. Cas. 710; Gibbons *v.* Wisconsin Valley R. Co., 58 Wis. 335, 13 Am. & Eng. R. Cas. 469; Slossen *v.* Burlington, C. R. & N. R. Co., 60 Iowa, 215, 11 Am. & Eng. R. Cas. 67; Lanning *v.* Chicago, B. & Q. R. Co., 68 Iowa, 502, 25 Am. & Eng. R. Cas. 493; Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 253, 254. Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction, or improper management; and those put out by other engines are excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive. It is objected that evidence violative of this principle was introduced, against the objection of defendant. It does not appear that the testimony of Lester was objected to on this ground, or that that of York did not relate to the locomotive referred to in the declaration; on the contrary, it seems otherwise. The same is true of that part of the direct testimony of Erman so objected to. On the cross-examination he was asked what engine it was he saw throwing sparks "around the opera-house," and said he thought it was numbered 13, which, we may remark, is a different number from that given by the witnesses to the engine which set out the

fire on the morning of April 9, 1888. There does not appear, however, to have been any motion by defendant to strike out the direct testimony alluded to, and there is consequently nothing to found an assignment of error upon. Sill *v.* Reese, 47 Cal. 294, 341; Railroad Co. *v.* Shipley, 39 Md. 251.

VI. Upon the questions of proximate and intervening cause the court gave the jury the following instructions, (numbered here as in the record,) at the request of plaintiff: "(3) [Paragraph from third charge:] That it is for the jury to decide whether the burning of the plaintiff's property was the direct consequence of fire caused by sparks from defendant's engine; that, if the jury believe the fire, where it originally started, was caused by sparks from the defendant's locomotive, and that said fire spread, whether from the force of the elements or the inflammable character of the buildings, and burned continuously from building to building to plaintiff's buildings, and destroyed them, and that the plaintiff either had no power to arrest the flames, or was not present, and consequently could not do anything towards arresting the flames, the jury have the right to conclude that the fire set by the defendant's engine was the proximate cause of the destruction of the plaintiff's property." This charge is assigned as the 105th error.

Instructions as to proximate and intervening cause.

"(5) That, if the jury believe from the evidence that the sparks from the defendant's engine caused the fire, and that the spread of the said fire could not have been arrested, or was not occasioned by any new or intervening force, it does not matter whether the buildings belonging to the plaintiff that were destroyed were the first or the tenth. The original fire must be regarded as the proximate cause of the burning of the buildings." This charge is assigned as the 106th error.

Second instruction given by the court on its own motion: "Proximate cause is what leads to and might be expected directly to produce the injury; that is, such a cause as naturally suggests itself to the mind of a prudent man as likely to cause the accident which produces the damage." This charge is the 132d error assigned.

Third charge by the court: "To entitle plaintiff to recover, the defendant's negligence must be the proximate cause of the accident which produces the damage, without intervening carelessness on the part of the plaintiff, in which event he would become the author of his own misfortune, unless, by ordinary care, he could not have avoided

the consequences of defendant's negligence." This charge constitutes the 135d error assigned.

The fifteenth instruction requested by the defendant on the subject was also given, as follows: "The court instructs the jury that the immediate or proximate cause of any injury is that which immediately produces it as its natural consequence."

Upon the same questions the court below refused to give the following instructions, numbered as in the record, requested by the defendant. "(16) The court further charges the jury that, should they believe from the evidence that the negligence of the defendant caused the origin of the fire on the 9th day of April, 1888, in the town of Tavares, yet, if they further believe from the evidence that the wrongful act or willful omission of duty on the part of third parties intervened, and caused the spread of the flames beyond the natural sequence growing out of the first fire, and thereby caused the flames to consume the property of the plaintiff, the defendant is not liable by reason of the intervention of those causes." The refusal of the court to give this instruction is assigned as the 122d error.

"(17) The court further charges the jury that, although they may believe from the evidence that the fire originated from sparks emitted from the smoke stack of defendant's engine, and that, too, by the negligence of the defendant, yet if they further believe from the evidence that some new intervening force or agency carried the fire from where it was first started, beyond its natural or proximate sequence, to the property of the plaintiff, whereby it was destroyed, defendant is not liable for the destruction of plaintiff's property, and the jury should so find." The refusal of the court to give this charge is assigned as the 123d error.

"(18) The court further instructs the jury that, although they may believe from the evidence that the defendant negligently permitted sparks to escape from the smoke stack of its engine on the 9th day of April, 1888, in the town of Tavares, whereby fire was communicated to buildings, and the flames from which were communicated to the property of the plaintiff, which were thereby destroyed, yet, if they believe from the evidence that after the beginning of said fire, and before it reached the property of plaintiff, a fresh wind of additional force arose, and carried the flames to the property of the plaintiff, the defendant is not liable for such destruction, unless the jury further believe from the evidence that such flames would have been communicated to the property of the plaintiff as a natural consequence of the said first fire, and without the intervention of

the said force." The refusal of the court to give this charge is assigned as the 124th error.

"(14) The court charges the jury that, although they may believe that the defendant was guilty of negligence in setting out fires from its engines in the town of Tavares on the 9th day of April, 1888, it can only be held liable for the immediate or proximate, and not the remote, causes of the injury resulting therefrom." The refusal of the court to give which charge is assigned as the 121st error.

After full consideration of the evidence as to whether it furnishes any groundwork for the suppositions premised in these four instructions that were asked and refused to be given, we are unable to see that there was error in such refusal so to give them. And this for two reasons: (1) Because we fail to discover in the record any modicum of evidence, even, that would furnish a basis for the premises supposed in the first three of these instructions. As to the sixteenth instruction above, that was asked and refused to be given, the premise upon which the defendant sought therein to construct the defense of intervening cause is "that, if the jury believe from the evidence that the wrongful act or willful omission of duty on the part of third parties intervened, and caused the spread of the flames beyond the natural sequence growing out of the first fire, and thereby caused the flames to consume the property of the plaintiff, the defendant is not liable," etc., we cannot find in the record even a spark of evidence tending to prove that any act of commission or omission of any third party intervened and caused the spread of the flames beyond the natural sequence of the first fire. So, also, do we fail to find the evidence in the record upon which to base the premise of the seventeenth instruction asked above, and refused to be given. The supposed fact premised therein is "that some new intervening force or agency carried the fire from where it was first started beyond its natural or proximate sequence to plaintiff's property, and destroyed it," etc. There is no evidence in the record out of which this statement of fact could reasonably have been deduced.

And so with the eighteenth instruction above, asked and refused to be given. It is premised upon the assumption of the fact that "a fresh wind of additional force arose and carried the flames to the property of the plaintiff," etc.; but we fail to see in the record proof from which this assumption of fact could reasonably have been deduced sufficient to predicate thereon the askings contained in this eighteenth instruction refused, even if the coming up of a sudden wind could properly be regarded as such an intervening agency

as could not reasonably have been expected. In the argument of the cause it was contended with great ingenuity by the counsel presenting this branch of the defense, that there was foundation for this charge in that part of the evidence of the plaintiff's witness, W. S. Blaisdel, wherein he says "that the smoke was rising up straight, and the wind was sufficient to drive it a little towards the east—the heavier fire; the contention of the argument being that because the smoke rose straight up, it could be inferred therefrom that when the fire first started there was no wind blowing; but this witness in the same sentence says that the wind was sufficient to drive the smoke and the heavier fire a little to the east. And in another part of his testimony this witness says: "The wind was to the southeast, and the water was pretty rough" (meaning the water of a lake, on the shore of which the town of Tavares is situated.) And it was further contended in the argument that there was food for this eighteenth instruction in the following piece of testimony of the plaintiff's witness, J. H. Sears: "My first notice of the flames was seeing them rush under and between the buildings. Then the flames communicated from one building to the adjoining. The wind seemed to freshen, if anything." The fact was lost sight of in the argument that this same witness in another part of his evidence stated that before any of the buildings caught, while he, with another, were trampling out burning coals of fire near to and along the sidewalk, "the wind was blowing quite fresh." We believe it to be a philosophic truth, capable at any time of practical demonstration, that every extensive fire so rarifies the air within the radius of its heat as to create a vacuum, into which the denser surrounding air rushes to fill the void so abhorrent to nature. The witness Sears does not state whether the "seeming" freshening of the wind, about which he speaks, went to any greater extent in this instance than was the natural consequence of so large a conflagration. We confess our inability, even in the light of the ingenuity displayed in the argument of counsel, to see anything in these detached parcels of evidence upon which the assumption of fact in these refused instructions can reasonably be predicated, particularly when considered in connection with other parts of the testimony of the same witnesses from whose evidence they are excerpted.

It is well settled that instructions of law must be predicated upon some evidence that has been introduced at the trial; and that a refusal to give instructions that are mere abstract propositions, not based on any color of evidence in the case, affords no ground of exception. Randall *v.* Parra-

more, 1 Fla. 409; Proctor *v.* Hart, 5 Fla. 465; Judge *v.* Moore, 9 Fla. 269.

Second. The other, or second, reason why we think there was no error in the refusal to give the above four instructions asked by the defendant is that we think the substance of the propositions of law contained therein, in so far as they were proper, are fully embraced in and covered by the instructions above quoted, that were given by the court. The instructions given embrace the law as fully as was warranted by the evidence in the case. The fourteenth refused instruction above might properly have been given, as it states the law correctly, and contains no assumption of fact not warranted by the evidence; but its proposition of law is fully covered in substance by the instructions that were given, and there was, therefore, no error in the discarding thereof by the court. Nickels *v.* Mooring, 16 Fla. 76; Wooten *v.* State, 24 Fla. 335.

Same—Liability where fire is caused by new intervening agency

The proposition of law desired by the first three of the above discarded instructions to be impressed upon the jury was that the defendant company was not liable for the destruction of the plaintiff's property by the fire originated through the defendant's negligence, if, from the evidence, it appeared that some new independent agency intervened, and that such intervening agency caused the destruction of plaintiff's property. While, as before stated, we have been unable to find any evidence upon which to build the theory of "intervening cause" in this case, yet we think the 5th, 2d, 3d, and 15th charges above, that were given, instructed the jury, as fully as was warranted by the evidence, that the defendant was not liable if plaintiff's loss was the result of any new intervening force or agency; and that it was not liable unless the plaintiff's loss was the direct, proximate, and natural consequence of its negligence. We have carefully considered the great number of authorities cited by all the council in their briefs, besides many others suggested by those cited, and we think that the instructions given upon this feature of the case, as above quoted are fully sustained, not only by the numerical strength of the authorities, but by the clearness and force of the reasoning therein, and, to our minds, by the soundness of the principles therein enunciated. There seems to be no fixed rule by which accurately to apply the maxim *causa proxima, non remota, spectatur* to the circumstances of every individual case; each case necessarily depending for the applicability of this rule, upon its own peculiar facts. But in Parsons on Contracts (volume 3, p. 180, 7th Ed.) we find the clearest and most comprehensive explanation of the maxim, and a formula

for its application that will furnish a test in almost every case, in the following terse language: "Every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration." The same author (*Id.*) says, as to the test whether a cause of damage was proximate or remote: "Did the cause alleged produce its effect without another cause intervening, or was it made operative only through and by means of this intervening cause?"

In Fent *v.* Toledo & W. R. Co., 59 Ill. 349, a case almost on all fours with the one under consideration, in which a locomotive, passing through a village, threw out great quantities of unusually large cinders, and set on fire a warehouse near the track, from which the plaintiff's building was destroyed, 200 feet distant, the weather at the time being very dry, and the wind blowing freely, Chief Justice LAWRENCE, rendering one of the ablest opinions upon this subject we have seen, in which many authorities are reviewed, says: "We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire."

Whether the injury complained of is the proximate result of the defendant's negligent act, or whether the injury was too remote from the original cause, and was brought about by some independent intervening force or agency, are questions of fact peculiarly and exclusively within the province of the jury to determine. These propositions, though not in the same forms of expression here used, are substantially embraced in the instructions above that were given; and the soundness of them as propositions of law are fully sustained by the following authorities: Pennsylvania R. Co. *v.* Hope, 80 Pa. St. 373; Atchison, T. & S. F. R. Co. *v.* Bales, 16 Kan. 252; Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354; Clemens *v.* Hannibal & St. J. R. Co., 53 Mo. 366; Poeppers *v.* Missouri, K. & T. R. Co., 67 Mo. 715; Perry *v.* Southern Pac. R. Co., 50 Cal. 578; Louisville, N. A. & C. R. Co. *v.* Krinning, 87 Ind. 351; Doggett *v.* Richmond & D. R. Co.,

78 N. Car. 305; Railroad Co. *v.* Gantt, 39 Md. 115; Kuhn *v.* Jewett, 32 N. J. Eq. 647; Murphy *v.* Chicago & N. W. R. Co., 45 Wis. 222; Rigby *v.* Hewitt, 5 Exch. 240; Smith *v.* London & S. W. R. Co., L. R. 5 C. P. 98; Kellogg *v.* Chicago & N. W. R. Co., 26 Wis. 223.

The following clause in the fifth instruction asked for by the plaintiff, and given: "The original fire must be regarded as the proximate cause of the burning of the building,"—is strenuously urged as error. Had this proposition been given as an independent abstract utterance, without any explanation or qualification, we have no doubt of its impropriety in a case like this; but, in considering it, reference must be had to that which precedes it in the same charge. When read in connection with the rest of the same charge it is nothing more than the expression of the conclusion to be reached if the hypothetical proposition put in the preceding part of the charge should be found in the affirmative. The objectionable clause might just as well, and possibly with more forceful grammatical construction, have been placed at the beginning of the charge, when it would have read as follows: "The original fire must be regarded as the proximate cause of the burning of the building if the jury believe from the evidence that the sparks from defendant's engine caused the fire, and that the spread of the said fire could not have been arrested, or was not occasioned by any new or intervening force; it does not matter whether the buildings belonging to the plaintiff that were destroyed were the first or the tenth." By this transposition of sentences, without change of verbiage, it at once appears that there was no error in the clause objected to, connected, as it was, with the preceding part of the charge.

The original fire as a proximate cause.

VII. As to the measure of damages, the following instructions, numbered here as in the record, were given to the jury: "(21) That the measure of damage in cases of this kind is the value of the property at the time it was destroyed, with interest at the rate of eight per cent. per annum; that the jury have the right to arrive at this value from the testimony of the witnesses, of the weight and credibility of which they are the sole judges." (117th error assigned.)

Instructions as to measure of damages.

"(8) [General charge by the court]: If the jury believe from the evidence that the fire which destroyed plaintiff's property was caused, as laid down in the declaration, by the negligence of the defendant as a proximate cause, and that no negligence of the plaintiff concurred as contributing to the result, the plaintiff is entitled to recover from the defendant the value of the property destroyed at the time and place

of its destruction, which value you must arrive at from the evidence, with eight per cent. per annum interest added from the 9th of April, 1888, to this time." (138th error assigned.)

Upon the same question the following instructions were asked for by the defense, and refused to be given by the court, numbered here also, as in the record, to wit: "(28) The court instructs the jury that, should they find from the evidence that the defendant is liable for the burning of plaintiff's property, in estimating the damages for the property destroyed they must be governed by the market value of the property at the time and place it was destroyed." (Its refusal is assigned as the 128th error).

"(29) That it devolves upon the plaintiff to prove by a preponderance of evidence, the market value of the property destroyed." (Its refusal is assigned as the 129th error.)

"(30) That, should the jury find from the evidence that defendant is liable for the burning of plaintiff's property, in estimating the damages resulting therefrom they are confined to the market value of the property destroyed at the time and place of its destruction, and they are not to be governed alone by the cost of the property to the plaintiff; but they may take into consideration the age of the property destoyed, its deterioration from use, its situation, the quality of its materials, and all other facts given in evidence which bear on the market value of the property at the time and place it was destroyed." (Its refusal is assigned as the 130th error.)

How damages should be fixed.

The law as to what is the "measure of damage" in the abstract, in cases where the property of one has been destroyed, unintentionally, but by the negligence or carelessness of another, where there is no element of willfulness or maliciousness in the destruction, is well settled to be "just compensation in money for the property destroyed;" such an amount as will fully restore the loser to the same property *status* that he occupied before the destruction. To arrive at the amount of such compensation, inquiry, in the absence of malice, is necessarily confined strictly to the ascertainment of the value of the properties destroyed, with such incidents of interest for the retention of such value from the person entitled thereto as may be sanctioned by law. The contention of the appellant in urging as error the giving of the above-quoted instructions by the court on this subject, and the refusal to give the above instructions by it asked for, is that the plaintiff, in establishing the value of his destroyed properties, should have been confined to proof of its market value at the time and place of its destruction; and that the

admission of evidence as to the original cost of the properties, and as to the depreciation thereof from its original cost by usage or otherwise, was erroneous; and that it was error to instruct the jury that the plaintiff was entitled, as matter of law, to interest, at the rate fixed by law, upon whatsoever amount of damages they might find the plaintiff to be entitled to.

Market price as measure of damages—Evidence as to values.

Wherever there is a well-known or fixed market price for any property, the value of which is in controversy, it is proper, in establishing the value, to prove such market value; but, in order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor,—an ability, from such demand, to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing,—no ability to sell the same,—then it cannot be said to have a market value "at a time when, and at a place where," there is no market for the same. We think it would have been a very harsh rule in a case like this to have confined the plaintiff to proof of the market value of the property at the time and place of its destruction, in the absence of proof that at the time and place of such destruction there was a market for such property. In cases where property is of a well-known kind in general use, having a recognized standard value, it is not proper to circumscribe the proof of such value within the limits of the market demand at the time when, and at the place where, it was destroyed. Were the rule contended for to prevail, then the compensation for personal properties, confessedly worth thousands of dollars, would be reduced to a pittance in cents if destroyed *en route* from market to market, in a thinly-settled, barren country where there was no demand, simply because of the accident of "time and place" of its destruction. In actions of this kind, where the value of the properties destroyed is the criterion of the amount of damage to be awarded, and the property destroyed has no market value at the place of its destruction, then all such pertinent facts and circumstances are admissible in evidence that tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such pertinent *data* as will enable them reasonably and intelligently to arrive at a fair valuation; and to this end the original market cost of the property; the manner in which it has been used; its general condition and quality; the percentage of its depreciation since its purchase or erection, from use, damage, age, decay, or otherwise,—are

all elements of proof proper to be submitted to the jury to aid them in ascertaining its value. And to establish value in such cases the opinions of witnesses acquainted with the standard value of such properties are properly admissible. Sullivan *v.* Lear, 23 Fla. 463; Lafayette, B. & M. R. Co. *v.* Winslow, 66 Ill. 219; 1 Thomp. Trials, § 380; Ohio & M. R. Co. *v.* Irvin, 27 Ill. 178; White *v.* Hermann, 51 Ill. 243; Pennsylvania & N. Y. R. & Canal Co. *v.* Bunnell, 81 Pa. St. 414; Vandine *v.* Burpee, 13 Metc. (Mass.) 288.

Judge COOLEY, in Continental Ins. Co. *v.* Horton, 28 Mich. 175, in speaking of evidence based on a knowledge of the purchase price of property, says: "The objection that the daughter of the plaintiff was allowed to testify to the value of articles burned, without having been shown to possess the proper knowledge to qualify her to speak as an expert, was not well taken. She testified that she bought a good many of the articles, and was present when others were bought. On this evidence she had some knowledge of values which it was proper she should communicate to the jury. The extent of that knowledge, and its sufficiency as a basis for a verdict, were to be tested by her examination, and by the good sense and judgment of the jurors." Coburn *v.* Goodall, 72 Cal. 498; Com. *v.* Sturtivant, 117 Mass. 122; Derby *v.* Gallup, 5 Minn. 119, (Gil. 85), The Slavers, 2 Wall. (U. S.) 375; Johnson *v.* Warden, 3 Watts, (Pa.) 104; Whipple *v.* Walpole, 10 N. H. 130; Joy *v.* Hopkins, 5 Den. (N. Y.) 84.

In Norman *v.* Wells, 17 Wend. (N. Y.) 136, the court says: "The ordinary, and in general the only, legal course is to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount. They are the only proper judges. They are impartial, and capable of entering into these ordinary matters."

In Clark *v.* Baird, 9 N. Y. 183, JOHNSON, J., delivering the opinion, says: "Upon this ground, as well as upon that of superior convenience and the constant reception of such testimony upon trials without objection,—a tacit, but strong, proof of its propriety,—it must be deemed established that, upon a question of value, the opinion of a witness who has seen the thing in question, and is acquainted with the value of similar things, is not incompetent to be submitted to a jury." Hamer *v.* Hathaway, 33 Cal. 117; Rogers *v.* Mechanics Ins. Co., 1 Story (U. S.) 603; Blydenburg *v.* Welsh, 1 Baldw. (U. S.) 331; Whitbeck *v.* New York Central R. Co., 36 Barb. (N. Y.) 644; Luse *v.* Jones, 39 N. J. Law, 707, Brown *v.* Werner, 40 Md. 15; Allison *v.* Chandler, 11 Mich. 542, Fremont, E. & M. V. R. Co. *v.* Marley, 25 Neb. 138; Browne

v. Moore, 32 Mich. 254. We think the evidence as to values admitted in this case were fully confined within the limits of the principles announced, and that there was no error in the admission of such testimony, nor in the giving of the instructions above quoted upon the question of the measure of damages nor in the refusal to give the above quoted instructions asked for by the appellant.

It is also contended by appellant that the sole proof of value, excepting the evidence of Randolph as to the rental payable by him, is by or upon the theory of proving cost, and then the depreciation, and making this the test of value. Mr. Alexander St. Clair-Abrams, a witness for plaintiff, was permitted, without objection from defendant, to describe minutely the hotel, which was originally built in 1882, and enlarged in 1886 to a four-story building with tower, and the kind and quality of the timber and materials of which it was constructed, furnished, plastered, and painted. He says when the building was first put up he was present, acting as the superintendent of it, almost every day, and then owned a saw-mill at Tavares, at which the lumber put into the building was manufactured from the best logs. He also described with fullness the other buildings, and the furniture and other personal property belonging to the plaintiff company involved in this suit. He was then asked what it cost to construct the hotel, and defendant objected, on the ground that it was "not the proper way to prove the true measure of damages, the true measure being the market value of the property at the time and place of its destruction;" and the objection was overruled and exception taken. At this juncture it was stated to the court on behalf of plaintiff that this evidence of cost was not offered as evidence of the value, and that the plaintiff admitted that the value of the property at the time of the fire was the true measure of damage, and that this statement of cost was put in for the purpose of enabling plaintiff to show by subsequent testimony what the value was at time of the fire. The witness then testified that the hotel building, with tower and outbuildings, and its appurtenances, cost over $42,000. That when the first building was put up the cost of building material and labor and the freights were much higher than when the extension was made; and that he had a personal knowledge of the cost of lumber, as he was for five years actually engaged in and was at the time in the saw-mill business; and that, when the extension was made, the cost of labor and material was about the same as when the fire took place; that the condition of the building was perfect; that in 1886, when

Proof of value—Cost of property—Depreciation.

the extension was made, he had the original building examined, helped to examine it, and found everything in perfect condition; that at the time of the fire the paint was faded, but the walls were perfect and unmarked, and the ceiling good in condition, and the wood-work all as sound, apparently, as the day it was built; that he had constructed 30 or 40 buildings since he had been in Florida, they ranging from a little shanty to an hotel. Here the plaintiff's attorney asked him what he estimated the value of the hotel to have been on the day of the fire, and defendant objected, because it sought to elicit an opinion from the witness, who had not so far properly qualified as an expert, or shown himself legally qualified and competent to give an opinion. The question being withdrawn, he stated that he was familiar with the construction of buildings, and that there was no arbitary rule governing the deterioration of any building, and was thoroughly acquainted with the hotel at the time of its burning, and had been ever since its construction. Here being again asked what the value of the hotel was on the day of the fire, he, after objection, no ground being stated, and exception, by defendant, to the ruling of the court, replied that he estimated the value of the hotel with the outbuildings on the day of the fire at $35,000, stating again that the building on that day was in perfect condition, except painting on three sides; the flooring and interior painting, frame, and everything being in perfect condition; and that he arrived at his estimate of the value at the time from his personal knowledge of the prices of materials and labor in April, 1888, as compared with prices of labor and material in the previous years in which the building was constructed. That in 1882, when the building was put up, lumber was considerably higher in price than in 1886, when he enlarged it. Rough lumber was "from $15 up;" dressed lumber in the same proportion. In 1886 rough lumber had fallen to $12, delivered in Tavares. In 1888 mill lumber was $10; selected lumber, not all heart, $12; all heart, free from knots or windshakes, in 1886, could not have been purchased for less than $15 or $16 a thousand, delivered in Tavares. That he spoke particularly of the first building, where he selected and delivered nearly all the lumber put in it, superintending the loading of the wagons and hauling to the building, and thinks he can safely say that there was not one stick of timber put in the first building that had a windshake or knot in it; all was soft, heart pine lumber. That they had probably a million feet to select from in the yard. That the hardware in the building was all purchased by him personally, from dif-

ferent parties in New York, Jacksonville, and elsewhere; and that he was acting superintendent of the construction of the little building and the enlargement of it.

He also testified, subject to the objection that it was improper and incompetent, that he had the store at the corner of New Hampshire avenue constructed, and was there nearly every day, and his office was on the second floor, and personally made repeated examinations of the building, as he did all his other buildings in Tavares, and it, with its annex, cost $4,000; several hundred dollars being spent for certain decorations, which had been taken away before the fire; and the building, with its annex, he, from his knowledge of the price of material and labor in April, 1888, estimates at the value of $3,500; that the building east of this one was constructed by witness. The newspaper office was on its second floor, and the paper was owned and published by him for several years, and he was almost daily in the newspaper office, and examined the building frequently, and that it cost $2,000; and witness was familiar with its value on the day of the fire, and estimates it at $1,400. That the stable, which he says he constructed and helped to do the carpenter work on, was built in 1885, and cost about $1,500; and he estimates the value of the building, with which he says he was familiar, at about $1,000. That he had the cottage on Ruby street constructed, and it had cost about $600 or $700 at the time of the fire, and he estimated its value then at about $400. That he had a cottage on East Ruby street built, and was frequently in it, and it cost $400 or $500; and he was familiar with its value on the day of the fire, and estimates it at about $200. That he was acquainted with the value of the three remaining cottages, having had them constructed under his supervision. That they cost about $350 each; and he estimates their value, with which he is familiar, at about $200 each.

That in estimating the value of the hotel at the time of the fire he makes allowance for the deterioration of the building. That the deterioration of a building of that character —a wooden building, of yellow pine—depends largely on the quality of the timber put into it. If it is clear, heart lumber, free from windshakes or knots, and painted over, and protected from the weather, it is very difficult to say when deterioration begins. If it is what is called "mill run lumber,"—that is, a whole log taken through, with portions of sap in each board,—deterioration will begin in two or three years, at times earlier; but on clear, heart lumber, such as was put into that building, he does not believe there was a deterioration of 5 per cent. in 10 years on the building.

That the roof of the building was covered in 1886 with new tin, and with three coats of paint on the tin. That there could not have been any deterioration in two years. That he made a very large allowance for deterioration in the other buildings; as the material was not so select as that put in the hotel.

He also stated, under objection that it was "improper," etc., the cost of the furniture and outfit of the hotel was nearly $15,000 gross, or $14,600 or $14,700, exclusive of the the freight. He gives the cost of a great many, if not all, of the separate things composing this outfit. He states that he was thoroughly acquainted with this property on the day of the fire, and was familiar with its value at that time, having bought and sold furniture for nearly five years in Tavares, and having stayed in the hotel nearly all the time up to a short time before its destruction, and had, several days before the fire, taken a Mr. Roost over the entire building, with the view of renting it to him for the ensuing year, and therefore examined everything but a few days before the fire. The furniture, he says, was in complete condition. There was but one bedstead in the entire furniture that was hurt; that was on the fourth floor. Some Englishmen got on a frolic, and broke it where the locks go into the sides. That was the only one thing that was not in absolutely perfect condition. "I estimate the value of the entire outfit on the day of the fire at $10,000. I dealt in furniture for four years, and know what the price is; and I will state I could have sold the furniture in my store for over $10,000.

He states that the counters, shelving, etc., in the first store cost $1,150 or $1,200, and shows his familiarity with them. He does not state their value. Gives the cost of the life-preservers, maps and harness at $2,000, and their value at the time of the fire as $1,000. That he purchased the entire outfit of printing material in Cincinnati, and published and edited the Tavares Herald for several years. That it cost $1,600 there, and part of the furniture for it he had made at Tavares at a cost of about $100; and he estimates the value of this property on the day of the fire at $1,200. A large amount of the type had never been used.

W. P. Floyd, a carpenter, who says he superintended the work of enlarging the hotel, he having had charge of the carpenter and mason work, testifies that he made an examination of the original building before enlarging it, and found the sills sound, and the plastering good; and says all heart pine was put in the new building as near as he could get it, the lumber being selected and the framing being sawed out specially for it. He describes the building and material

fully, saying that between $3,600 and $3,700 were paid for carpenter's work alone; that very little repair had to be made on the building up to the time of the fire; and that he had charge of the plaintiff company's work up to that time; no repairs, outside of a pane of glass, or some little thing about the water-closet, or something like that. The building was in good condition at the time of the fire. He also describes the counters and shelving of the corner store, which counters and shelves he regards as being elaborate, and a good solid job, and in good condition on the day of the fire, so far as he knew, which counters and shelves he estimates, from his practical knowledge of building them, as worth three to four dollars a running foot on the day of the fire, and that other counters, of not so fine a quality, were worth two dollars per foot. He did his trading in the store, and was there "every day or evening."

J. H. Sears, a practical carpenter and builder of 44 years' experience, and who had done building in Florida for about two years before the fire, and at Tavares, and is familiar with the price of lumber, building material, and labor, upon being given specifications, diagrams, and photograph as descriptive of the hotel, was asked to state what it would have cost the plaintiff to have such a building constructed on the 9th day of April, 1888, the day of the fire. The question was objected to as not stating a proper hypothetical case to be submitted to the jury under the facts of the case at bar, and as too indefinite, and offering too wide a latitude, and not confining the estimate of the witness to a definite building, and as misleading, incompetent and irrelevant; but the objection was overruled, and exception taken. His reply was $35,637.17, including 15 per cent. for builders' commissions, or $31.207.82, exclusive of such commissions. That he lived in the building more than a year, and that the character of the construction was very fine and good. Had occasion to notice the character of the construction; as a builder he generally looked out for such things. Had taken no particular notice of the plastering on the walls, but knows it was a good job, and noticed that in burning down the boarding had burned off the framework, leaving the skeleton—the walls—standing, and the frame-work burning; and it fell piece by piece, showing it was thoroughly put up, and solidly constructed. That he was in the building at times other than when he lived in it. Had no other place to sit around except on the piazza in the evenings. That he spent much time there, went inside, occupied three different rooms when he lived there, and had been over the building or through it, except the upper story, which he was

never in, and has sufficient personal knowledge of the building to be able to give an estimate of its value on the 9th of April, 1888. That the condition of it on the day of the fire and prior was about perfect. In reply to the question now put to him as to his estimate of the value of the building on the day of the fire, he replied: "I have been used to adjust fire losses north, and am pretty well posted. That building was worth $35,637.17 on that day of the fire." He, in reply to a subsequent inquiry, said he would not take the contract to put up the building on that day for $31,000. He also stated that it would have cost $3,500 to $4,000 to construct the corner store building on the day of the fire, and that from his knowledge of its condition it was then well worth $2,600; and that the second store, with the condition of which he was well acquainted at the time of the fire,—it being good, —was worth $1,300.

W. A. Miller, a contractor for buildings of all kinds, who has been engaged in the business for five years, and lives at Sanford, Fla., and was familiar with the price of material and labor in 1888, and at the time of the fire, stated in answer to a question like the first given above as propounded to Sears, the same objection and ruling and exception being made, that it would have cost $30,000, and that there would have been no deterioration in such a building in two years.

C. E. Pearce, a contractor for thirty years, and for eight years in South Florida, and familiar with the cost of labor and building material in April, 1888, replied to the same question, under same objection, ruling, and exception, that it would have cost $27,964.20. That he had a personal knowledge of the price of lumber and woodwork, and some acquaintance with the building. Had been in it, but his knowledge of the building did not aid him in making the estimates. That there would have been five per cent. depreciation in the building for the two years in that locality, and, supposing one-third of it had been constructed in 1882, that one-third would have depreciated over ten per cent., but not if it had been thoroughly repaired in 1886.

W. T. Cotter, a witness for defendant, carpenter and builder of all kinds for twenty-five years, who has built all classes of buildings in Florida, in answering the same question, put the estimate at $18,000, and says he would have built it for this price; and that the corner store could have been built for $2,500, correcting a previous estimate of $4,000; and that the second store could have been built for $1,100. He states the depreciation of buildings in Florida to be from five to seven per cent.

J. K. Barrett, a witness for plaintiff, who was in charge of

the hotel from December, 1885, to April 20, 1886, it having been refitted after he took charge, and had been in the hotel business twenty years, describes the furniture and outfit, and estimates its value as of that time at from $7,000 to $7,500.

E. S. Newell, a witness for defendant, and steward in the hotel from December, 1887, to February 22, 1888, considers $3,000 a very liberal estimate of value. He says furniture in hotels, when the lease changes at short periods, depreciates from twenty to twenty-five per cent.

D. S. Randolph, the lessee of the hotel from December, 1887, up to the time of the fire, says the lease was at $100 per month, he to put in all repairs; that when he rented, Mr. St. Clair-Abrams said the house was in such bad condition he thought of shutting it up, and would not put in any repairs. His estimate of the value of the furniture is $2,575, and says the annual depreciation of furniture in hotels is twenty to twenty-five per cent. and upwards; that the linen depreciated fifty per cent.

There is an irreconcilable conflict between Newell and Randolph on the one side and Mr. St. Clair-Abrams on the other as to the quantity, quality, and condition of the furniture in the hotel; but it is sufficient, without mentioning particular points in which other witnesses sustain the last-named witness, to say that the jury has settled this. Mr. St. Clair-Abrams also states that the terms of the lease had been changed to a percentage on the gross income over a certain sum, which is denied by Randolph. Randolph also stated that a great many panes of window glass were out and that the house leaked.

The amount which it would have cost to erect buildings of the same kind on the day of the fire, less a proper deduction for deterioration, is not the proper measure of damages in a case of this kind. In Burke *v.* Louisville & N. R. Co., 7 Heisk. (Penn.) 451, where the plaintiff's dwelling and contents had been destroyed by fire communicated by sparks from the railroad company's locomotive, the jury were instructed that the measure of damages would be just what it would cost in cash at the time and place of the burning to replace the house and each article consumed in it. This was held to be inaccurate, and calculated to produce confusion in the estimate of damages, and the better instruction to be that the measure of damages would be the value of the property destroyed at the time and place of the destruction. In Lafayette, B. & M. R. Co. *v.* Winslow, 66 Ill. 219, a case of condemnation of private property for railroad purposes, the company having taken land and destroyed the

buildings upon it, it is said: "For all the property of appellees taken by the corporation for their uses, or damaged by it, just compensation must be made to the owners. If a building stands in the way of the road which it is necessary to destroy, its value must be paid by the corporation, and the jury, in estimating its value, will take into consideration, not the value of the materials composing the building, but the value of the building as such."

The value of the property at the time and place of the fire is the question the jury is to pass upon. This the court charged, and the plaintiff admitted. Market value is what a thing will sell for. Pennsylvania & N. Y. R. & Canal R. Co. *v.* Bunnell, 81 Pa. St. 414. To make a market, however, there must be buying and selling. Blydenburgh *v.* Welsh, 1 Baldw. (U. S.) 340. Property may have a value for which the owner may recover if it be destroyed, although it have no market value. Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354, 380. "Suppose," asks the court in the case just cited, "a rod of railway track, or a shade tree, or a fresco painting on the walls or ceiling of a house, or a bushel of corn on the western plains, should be destroyed, could there be no recovery for these articles simply because there might be no actual market value for the same?" To fix the market value of a thing, it seems to us that there must be a selling of things of the same kind. If there had ever been a sale of an hotel, or of any other building, in Tavares, we are not informed; and we have no judicial knowledge, nor does the record inform us, that hotels have a market value there. Yet, though there is no market value or standard value, the plaintiff should not be allowed more than the property destroyed by fire on the 9th of April, 1888, was reasonably worth in Tavares. To do this it is proper to invoke the aid of all facts calculated to show its value, and we are unable to perceive that the circuit judge erred in admitting the evidence of the cost of replacing the building on the day of the fire. It was a fact tending to show, and to be considered with others, by the jury in determining what amount of money would put the plaintiff in the position in which he was at the time. If there were any other facts incident to the condition of Tavares, considered in a business or other point of view, calculated to affect the value of this or any other property there, and which would qualify or outweigh the item of this cost of restitution, and such facts do not appear in the record, we are not responsible. It must be assumed there were none other existing. By saying the testimony was admissible we do not say what weight should be given it, nor do we come into conflict with

the Tennessee and Illinois cases last mentioned. The evident meaning of those cases is that the cost of restitution or of the materials is not the measure of damages governing the jury, and not that such facts can never be considered in arriving at the true value or measure of damages. If an article has no market value, its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of cost, and its utility and use. 2 Suth. Dam. 378. In Luse *v.* Jones, 39 N. J. Law, 707, the plaintiff was permitted to show the cost of a bedstead as tending to prove its value. This cost was the price at which a regular dealer in such articles had sold it when new in the ordinary course of trade. "A sale so made," said the court, "was evidence of the market value of the thing when new, and the value of such goods when worn can scarcely be ascertained except by reference to the former price, and the extent of the depreciation. Of course, the cost alone would not be a just criterion of the present value, but it would constitute one element in such a criterion, and the attention of the jury in this case was clearly directed to the importance which it deserved to have." See, also, Sullivan *v.* Lear, 23 Fla. 463, 474. In Whipple *v.* Walpole, 10 N. H. 130, it was held it was admissible to prove what horses like those lost or injured cost at a town near the place where the loss occurred. Upon the same principle, and for even stronger reasons, we think that the cost of restitution at the time of the destruction of the building was an element which might be considered by the jury with others in ascertaining value.

The suggestion of appellant's brief that what a building is used for, whether it was a home or a business house, what income was derivable from it, where it was located, what its surroundings, enter into the consideration of value, are, as to the hotel, met by the evidence in this case, and, except as to that of income, the same may be said of the other buildings. Whether or not any of the buildings were profitable as investments at the time of the fire the defendant could, if such evidence was admissible, have elicited on cross-examination of plaintiff's witnesses, or by independent testimony, as might have been proper under the circumstances; and the same may be said also of the suggestion as to the "prospects" of these properties, and of the value of other property in the vicinity, and of the land after the houses were burned. "What were the whole premises worth in the market, as they stood at the time of the fire," is, if we substitute the words "at Tavares" for "in the market," the question really submitted to the jury for decision.

The question of value in cases where, as here, there is no market value, is one peculiarly for the jury. Nothing has been permitted to go to this jury which it was improper for them to consider in coming to a conclusion as to the value of the several kinds of property involved. It cannot be assumed that there were other persons who would have testified to facts or circumstances other than those shown by the record, of a character to influence the jurors to a lower estimate of the values, or have themselves placed a less value on the property. The jury has returned a verdict according to its judgment, and it is undeniable that they have not given the plaintiff the benefit of the several values insisted upon by the plaintiff's chief witness, but it is apparent that, after considering all the facts and circumstances and testimony, the jury has said what they deemed the property to be worth, falling considerably below the aggregate of that witness' opinion. There was, in our judgment, sufficient evidence to sustain the verdict, and we fail to find in the brief any contention that the verdict should be reversed as being excessive. If there were such contention, we could not sustain it.

Question of value was for jury.

VIII. Upon the question of the allowance of interest as matter of right upon the amount of damages found by the jury, from the date of the destruction of the property in cases like this, where the damages sued for are unliquidated, the following authorities, with others that we have examined, hold, in effect, "that the jury may, at their discretion, allow and include interest in their verdict as damages, but not as interest *eo nomine*." 2 Sedg. Dam. p. 190; authorities cited in note to Shelleck *v.* French, 6 Am. Dec. 196; Black *v.* Camden & A. R. & Transportation Co., 45 Barb. (N. Y.) 40; Central R. Co. *v.* Sears, 66 Ga. 499; Lincoln *v.* Claffin, 7 Wall. (U. S.) 132; Garrett *v.* Chicago & N. W. R. Co., 36 Iowa, 121; Bradley *v.* Wilcoxson, 44 Cal. 239. In all these authorities no other reason is given for this rule than that it has been so held in other cases that have gone before them, except that in a few cases it is put upon the ground that where property is wrongfully taken and withheld, the defendant gets the benefit of its use during the detention, and is required to pay interest as compensation for such use, when in cases of property wrongfully destroyed the defendant derives no benefit therefrom. The answer to this theory is that, in cases of this kind for the negligent and wrongful destruction of property, the issue as to the amount of the compensation does not depend upon benefits that accrued

Allowance of interest on amount of damages.

therefrom to the defendant, whose negligent act brought about the destruction; but the issue rests wholly upon the question as to what is the sum of the damage to the party whose property has been destroyed. Neither do we think this theory can properly be applied even in cases of trespass and trover. Interest on the value of the property taken in those cases cannot correctly be said to be allowed to the plaintiff "because the defendant derives benefit from the use of the property," but is allowed to the plaintiff to compensate him for his deprivation of its use during the detention thereof. Suppose in this case the furniture in this hotel, instead of being destroyed, had been wrongfully taken by the defendant, and had been carried away and disposed of at once by gift to other parties, or had been destroyed by fire or otherwise after the taking, so that it really derived no benefit therefrom, in an action for the recovery of its value interest under the modern authorities would be recoverable as matter of legal right: but in such case, would the subsequent gift or destruction thereof, and absence of beneficial use to the defendant, have any effect upon the right to the recovery of interest? The answer in the negative is self-evident.

In Ancrum *v.* Slone, 2 Spear (S. Car.) 594, in which this question of interest is discussed at greater length than in any case we have examined holding this view, FROST, J., says: "To the argument, if interest may be allowed in the aggregate damages found by a verdict, why may it not be allowed *eo nomine*?—the reply is: The law does not inquire into the particulars of a verdict for damages, and in some cases interest furnishes a just and convenient measure for the jury. But it is a stated compensation for the use of money, and, as it cannot be separated, even in idea, from debt, seems not properly incident to uncertain and contingent damages. The distinction is admitted to be one of form, depending on the form and cause of action. It is necessary and obligatory by law, to maintain the forms of action, with the distinctive rules which govern them. If this argument is not allowed to be decisive, there is no reason why *assumpsit* should not be brought on a sealed instrument, or one form of action serve alike for all contracts as well as torts. Besides, in actions sounding in damages, the liability, amount, and time, necessary incidents for the allowance of interest, are not ascertained and determined until the verdict is rendered. Interest being stated damages on pecuniary liabilities, to find a sum with interest in an action sounding in damages is to allow damages on damages, which is an incongruity." The pith of the

argument here is that the distinction grows out of and depends upon the "form" of action, and that it is necessary to maintain the "forms of action," with the distinctive rules which govern them. We cannot give our consent that matters of substance founded upon right shall be thus made subservient to the maintenance of the mere forms of action; or that money which rightfully belongs to a party shall be given when called by the name "damages," and withheld if chanced to be called "interest."

In Parrott *v.* Knickerbocker & N. Y. Ice Co., 46 N. Y. 361, the court says: "In cases of trover, replevin, and trespass, interest on the value of property unlawfully taken or converted is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another may not be included in the damages."

In the case of Ancrum *v.* Slone, *supra*, the court says: "It is necessary to the allowance and estimate of interest to ascertain the sum due, and the time when payable."

At what time does the liability for the negligent destruction of property attach to the wrong-doer if it shall be found that all things concur to set such liability in motion? It has been sometimes contended that such liability attaches only upon the finding of the jury. We do not think so. The verdict of the jury simply declares the liability and fixes the amount. The law attaches the liability at the time of the destruction, if all the circumstances attendant thereon concur in stamping the case with the legal elements of liability. As before seen, the measure of the loser's damage is the value of his property destroyed at the time of its destruction. Why at the time of destruction? Because it is at that time that the destroyer becomes liable for such value. The loser, before and at the time of such destruction, was entitled to his property, and the beneficial use of it; and instantly, upon such destruction, becomes, under the law, entitled to its value in money at the hands of the wrong-doer, and can sue instantly for such value. Because, through the law's delays, no opportunity is afforded to have the amount of that value declared by a jury for a year, perhaps several years, is it right that the loser shall, during all that time, be kept out of both his property, its use, and its value, without some renumeration for the retention by the wrong-doer of such value? Upon every principle of right we cannot think so. The theory of the measure of liability in such cases is just compensation. We cannot see either justice or completeness of the compensation dispensed

under a rule that declares a party who wrongfully destroys another's property to be liable at the time of such destruction for the value thereof, but that permits the wrong-doer to withhold such value for years, without some compensation for such retention. We cannot appreciate the force of the argument of the learned judge in Ancrum *v.* Slone, *supra*, "that to allow interest in an action for damages would be to allow damages on damages." It is true that in a certain sense it is an allowance of damages on damages, (interest being a species of damage), but it is not an allowance of damage on damage, for the same cause of damage. In the one case the principal sum—the value of the property destroyed—is awarded as the damage for the wrongful destruction; in the other, interest is allowed as the damage for the wrongful detention of such value.

In Chapman *v.* Chicago & N. W. R. Co., 26 Wis. 304, Chief Justice DIXON says: "In trespass, trover or replevin for the same property taken or converted by the defendants, such would have been the legal rule of damages; or, rather, the value, with interest from the time of the taking or conversion. Why should not the same rule prevail in this action? We are at a loss to assign any good reason for the distinction, if it can be said that it exists, or if it can be said to be in the discretion of the jury to give interest by way of damages in this case, whilst in the others they must give it as a matter of strict legal right. We say we can see no good reason for the discrimination. The object of the rule or of any rule of damages in any of the cases, is to give just and full compensation for losses actually sustained. It is obvious, regard being had to such compensation, which constitutes the foundation of the rule, that the giving of interest is as essential in this case as in any of the others. It is immaterial to the party who has lost his property, whether it has been taken and converted, or negligently destroyed by the other. His loss is the same in either case, and in either case he should be entitled the same compensation."

This view of the law accords fully with ours, and seems to be sustained also by the following authorities: 1 Suth. Dam. 174; Fremont, E. & M. V. R. Co. *v.* Marley, 25 Neb. 138; Mote *v.* Chicago & N. W. R. Co., 27 Iowa, 22; Sayre *v.* Hewes, 32 N. J. Eq. 652; Derby *v.* Gallup, 5 Minn. 119, (Gil. 85.) In the case of Milton *v.* Blackshear, 8 Fla. 161, (decided in 1858,) relied upon to establish a contrary view, the question under discussion was not involved. The action in that case was upon an account for lumber sold and delivered; and there is nothing in the decision that conflicts with the views here expressed. Neither do we find any-

thing in our statute that is inconsistent therewith. Our statute—page 545, § 1, McClel. Dig., (chap. 1483, Laws 1866)—provides as follows: "The legal rate of interest to be charged on all notes, money, or liability of whatsoever character, and upon all judgments, shall be eight per centum per annum." In view of the charges given, we must assume that they were heeded by the jury, and that they included interest in their verdict from the date of the fire to the day of their finding upon the amount found by them to be the value of the property destroyed, which value, by arithmetical rules, we find to be, in round numbers, forty-five thousand and some hundred dollars. The remainder of the verdict of $52,909.03 represents interest found by the jury for the period of two years and seventeen days intervening between the fire and the verdict. The established measure of damage in such cases being complete compensation, we feel that it would be doing a positive wrong to the plaintiff were we, because of these instructions on the question, to order either a new trial, or a *remittitur* of this sum, to which, upon every principle of right, the plaintiff is justly entitled.

The errors assigned for giving the above-quoted 21st and 8th instructions on the subject of interest and measure of damage, and for the refusal to give the above-quoted 28th, 29th, and 30th instructions asked for, cannot be sustained.

IX. It is claimed that the court erred in giving to the jury the seventh instruction requested by the appellees, which is as follows: "That, if the jury believe from the evidence that the defendant, or the defendant's agent at Tavares, had knowledge of the condition of the streets and of the sidewalks, and had knowledge that there was trash on or under the sidewalks, and that the sidewalks were of inflammable material, such knowledge can be considered by the jury in connection with the question of negligence in permitting the emission of sparks in large and dangerous quantities and of unusual size from the locomotive, if the jury believe from the evidence that such sparks were emitted." (Assigned as the 108th error.) The effect of this charge, though framed with cautious ingenuity, was to say to the jury "that, in considering the question of negligence on the part of the defendant company, the knowledge of the company's agent at Tavares of the inflammable condition of the sidewalks could be regarded as the knowledge of the defendant company, and that such knowledge might be regarded as an element of negligence." It is now no longer an open question, but well settled, that notice to an agent, to be binding upon his principal, must be concerning some

Knowledge of defendant's agent of inflammable condition of walks.

fact within the scope of the powers and duties of the agent as such. To charge the principal with the knowledge of his agent, it must be concerning some fact connected with the particular duties that the agent is authorized to perform for the principal. Story, Ag. § 140; Hiern *v.* Mill, 13 Ves. 114; 1 Pars. Cont. 77, and authorities cited in note x; 1 Rorer, R. R. 669; Fulton Bank *v.* New York & S. Canal Co., 4 Paige (N. Y.), 126; Congar *v.* Chicago & N. W. R. Co., 24 Wis. 157; Bank of U. S. *v.* Davis, 2 Hill (N. Y.), 451; Winchester *v.* Baltimore & S. R. Co., 4 Md. 231; Bank of St. Mary's *v.* Mumford, 6 Ga. 44.

We are not satisfied, in the absence of some definite evidence or better knowledge than we have, assuming that such knowledge can be invoked, as to the extent of the duties of a local or station agent, that notice to this agent was in law notice to the company, and therefore to the engineer managing the train; and, though the charge may be erroneous, we do not think it could have had any material effect on the conclusion of the jury as to the question of negligence.

The question of negligence in this case, as shown by the discussion of it in the second paragraph of this opinion, resolved itself into one of the relative veracity of the witnesses of the plaintiff and those of the defendant upon the issue of the emission of sparks as claimed by the plaintiff, and the presence of a proper spark-arrester, and its proper management, as claimed by the defendant. The jury have shown by their verdict that they believed the testimony given by plaintiff's witnesses as to the escape of the large quantities of sparks, or coals, and cinders of extraordinary size, and did not believe the defendant's contention. This conclusion results necessarily from the verdict, because a verdict finding negligence, as this impliedly does, could not have been reached, and cannot be maintained, on any other theory. The escape of such sparks was conclusive evidence that there was either not a proper spark-arrester, or that it was not properly managed; and the absence of such an arrester, or of proper management, established, of itself, negligence in the defendant. As the jury believed this testimony, it is altogether unreasonable to say that the charge under consideration could have influenced the verdict. Negligence was necessarily made out without its supporting influence, and could not have been made out without the evidence referred to, and the belief thereof. The above testimony, believed, as it was, precluded entirely any other verdict on the question of negligence than the one reached; and if the admission of the testimony on which the charge was

based, which testimony showed that the local agent had knowledge as to the trash and sidewalks, had been excepted to, and the question before us was the propriety of its admission, we should be compelled to say that it was error without injury; and our conclusion as to the charge is the same. The jury could not have found the verdict without believing plaintiff's witnesses, yet this charge could have had no effect in the formation of this belief; and, this being so, it had necessarily no effect upon the finding of negligence, the only point to which it related. Knowledge by the company or the engineer managing the locomotive of the alleged condition of the streets and sidewalks might, in the minds of the jury, have aggravated the degree of negligence to willful injury; but the escape of the sparks of the size and in the quantity indicated made a case of negligence, under the circumstances existing, independent of any consideration by the jury of knowledge or ignorance of the company or its agent.

X. The 113th error assigned is the giving of the fourteenth charge requested by plaintiff below, as follows:

Instruction as to inference of negligence from circumstances.

"That in cases of this kind the jury have the right to infer negligence from the circumstances of the case; that circumstantial evidence alone would authorize the finding of negligence; and that the jury have the right to presume from the escape of sparks in large and dangerous quantities, and of unusual size, from the smoke-stack of the locomotive engine, and at different times from this same engine, that the engine either did not have the most approved appliances to prevent their escape, or that the said appliances were not properly adjusted so as to prevent their escape, or that the engine was not handled or operated in a proper manner, and with due care and vigilance."

The merits of the proposition of law involved in this instruction have already been fully discussed in another part of this opinion, wherein it is held that the testimony of the plaintiff's witnesses to the effect that sparks and burning cinders of unusual size and in unusual quantities were in fact emitted from the defendant's engine, as against the evidence of the defendant's witnesses that the engine was in perfect condition, and skillfully handled, presented a simple question of veracity between the opposing witnesses, that was for the jury alone to settle; and, from what has been said, we cannot see that this charge is obnoxious to the law upon the subject, but, on the contrary, enunciates the principle correctly. We cannot discover therein any encroachment upon the province of the jury to deal with the facts.

It instructs the jury, in effect, that from certain circumstances mentioned they can, under the law, arrive at a mentioned result. It does not trench upon the facts by the assertion that any mentioned fact or circumstance does exist, or has been established; nor does it undertake to assert that the result therein mentioned has been reached, or should be established by the jury. We think the charge is fully sustained by the cases cited *supra*,—Burke *v.* Louisville & N. R. Co., and Atchison, T. & S. F. R. Co. *v.* Bales.

XI. The refusal of the court to permit defendant's witness L. P. Dupont to be interrogated as to what he heard other parties at the fire say in reference to its origin is also relied upon as error. It seems that the witness Dupont was in Tavares on the morning of the fire, and that on hearing the alarm of fire he went the scene of its origin, at Lester's saloon, and there heard, but did not see for himself, how it originated. We think the court properly excluded any detail of what others may have said in this witness's presence as to how the fire originated.

Hearsay evidence as to its origin of fire.

The origin of the fire was an independent, isolated fact, standing out by itself alone, that was necessary to be proven by direct, independent facts or circumstances; and if a knowledge of such fact is possessed by any person, such person should have been produced, and his knowledge thereof detailed under the sanctity of an oath as a witness on the stand. To have permitted the witness Dupont to state what he heard some one say was the origin of the fire would have been to admit hearsay evidence, pure and simple. 1 Greenl. Ev. § 108, in discussing the exceptional cases whereby hearsay evidence is sometimes permitted, says: "The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." The attempt here was not to introduce declarations or circumstances connected with, or a part of, or that illustrated the character of, the main fact necessary to be established, but it was an effort to prove the main fact itself by hearsay, which fact, as before stated, stood independent and alone. The object in having this witness to testify that he heard some one at the fire say how it originated was evidently for the purpose of establishing the fact that the fire's origin was other than sparks from defendant's locomotive. Suppose the witness had been allowed to so testify, what would it have proved? Clearly it would have proven nothing more than the bare fact that he did so hear; but this certainly could not be

claimed as an establishment of the truth of whatever it was that he did hear.

In this connection it is also contended that the court, in plaintiff's favor, committed the thirty-third error assigned, in permitting the plaintiff's witness J. H. Sears to relate a remark that he, Sears himself, made at the time he and one Terry were trampling out large coals of fire along the sidewalk, to-wit: "I remarked that if there were any coals underneath the plank walk we would soon have a blaze. The wind was blowing quite fresh at that time." And it is contended that the admission of this remark in evidence was the same in character as the testimony sought to be drawn from the witness Dupont. Where the parallelity or similarity lies between the two propositions, either in substance or effect intended to be produced, we are wholly at a loss to discover. The attempt with the witness Dupont, was to have him testify to what he heard another party say, in order to prove the origin of the fire. With the witness Sears, he was allowed to rehearse to the jury an observation or remark that he himself made as to the probability of a blaze "if there were any coals underneath the plank walk," such as he, at the time of the remark, was trampling out. And he gives as reason for the remark, that "the wind was blowing quite fresh at the time." In the case of Dupont, hearsay evidence was attempted; in the case of Sears, he was allowed to rehearse an oral observation made by himself, that was prompted by the surrounding circumstances at the time, of wind, dry weather, inflammable sidewalks, etc. If Sears, in the jury's presence, had stated that "he knew or thought at the time, from the surroundings, of fresh wind, inflammable sidewalks, and dry weather, that there would be a blaze if any of those coals were underneath the walk," it would have amounted to the same thing in substance and effect as the rehearsal of his formerly made oral remark. Under the strict rule of evidence, this observation of Sears should have been excluded; not upon the ground of it being hearsay, as was Dupont's, but because it was the expression of his opinion. But, in the light of the other legal, and with the jury convincing, testimony in the case, establishing the correctness and truth of Mr. Sears' observation, we cannot see that the restatement of that observation to the jury could possibly have been productive of any harm to the defendant.

Evidence for plaintiff after close of defendant's case.

XII. Another error assigned is the admission of certain evidence of one G. W. W. Davis, over defendant's objection. The objection was that his testimony was the same as that of certain of plaintiff's witnesses who had testified before the de-

fendant's witnesses, and that it was not admissible in rebuttal.

The authorities hold that it is within the discretion of the trial court to permit a plaintiff who may, before resting, have introduced enough testimony to make out a *prima facie* case, to introduce, after the defendant, additional proof in chief, as distinguished from proof in rebuttal; and the exercise of this discretion is not assignable for error except in cases of manifest abuse. Thomp. Trials, §§ 343–347. We do not see that there has been any abuse of discretion in this case. In view of the character of the defense on the question of negligence, and the fact that the decision of this question became one of the mere credibility of witnesses, we think the judge properly exercised that discretion in permitting additional witnesses to those first used to prove the escape of sparks by the same engine, either at the same or other points, that morning. It does not appear that the defendant was placed at an unfair position, or suffered any disadvantage from the mere fact of these witnesses testifying after the defendant had put in its case. No exercise of discretion unfairly as against the defendant on this line is shown.

XIII. There is sufficient testimony to sustain the verdict; and, while there is on some points such conflict between plaintiff's witnesses and those of the defendant as makes this peculiarly a case in which an appellate court cannot interfere or disturb the finding of the jury, there is no such inconsistency or conflict or unnaturalness in the testimony of the plaintiff's witnesses as can cause it to be said that no jury could believe them. Their credibility was a question for the jury. Interest in or connection with other suits of the same character against the defendant are circumstances affecting the credibility of witnesses. They do not disqualify the witnesses, but constitute a consideration with which the jury, and not the court, have to deal and have dealt.

Verdict sustained by evidence.

The member of the court whose name appears at the head of this opinion feels it is due to his associate, Mr. Justice TAYLOR, to say that he prepared about the same number of the subdivisions of this opinion as were prepared by such member.

The judgment is affirmed.

Judge MITCHELL, of the sixth circuit, sat in the place of Mr. Justice MABRY, who was disqualified.

ON REHEARING.

RANEY, C. J.—Appellant has petitioned for a rehearing of this cause.

In the fifth subdivision of the main opinion we said: "Appellant's counsel insist that the questions propounded to the witnesses A. N. Lester, J. S. Erman, *et al.*, by plaintiff, as appears from the 8th to the 102d grounds, inclusive, of the assignment of errors, were leading, and sought to elicit testimony which was irrelevant and incompetent, and that the court erred in overruling defendant's objection thereto; and they say that these objections are manifest on the face of the questions, and they submit them without argument. There are 147 assignments of error, of which a half dozen are expressly abandoned in this court. We have perceived no such infractions of the rules invoked as call upon an appellate court for interference, and we feel that counsel would have pointed out the same if they had detected them."

This conclusion was not reached by us unadvisedly. It expresses exactly what we intended to say. As careful a consideration had been given to the entire record and its bearing upon the numerous points discussed in the brief as the very impressive gravity of the case demanded, and we had found nothing justifying any other conclusion than that reached, as to any one of these points, or as to the whole case; nor had we perceived any such infractions of the rules as to leading questions, irrelevant or incompetent testimony, in the questions propounded to witnesses and not discussed in the brief, as called for a reversal of the judgment of the lower court. In saying this, however, we did not intend, and do not now desire, to be understood as holding that such a consignment to an appellate court of a long array of assignments of error, scattered throughout a bill of exceptions of 479 pages, should not be treated as an abandonment of them, even though it is accompanied with the assurance that they are "earnestly insisted upon." We do not mean to intimate, however, that counsel were at fault in not giving more attention to these assignments of error. On the contrary, we think, considering the whole case made by the record, that they gave them all the attention they merited.

The proper function of a petition for a rehearing is to present to us any omission or cause for which our judgment is supposed to be erroneous. No new ground or position, not taken in the argument submitting the cause, can be assumed. It is our duty to consider the petition in the light of this rule, and to grant a rehearing, if we find in it any-

thing which gives us reason to apprehend that the judgment rendered is erroneous. First Nat. Bank *v.* Ashmead, 23 Fla. 379, 391. We have carefully considered the points made in this petition, and find nothing in any of them to justify a rehearing, or that in the least shakes the conclusions reached in the main opinion. What is said in the main opinion of the testimony of Lester and Erman on the subject of former fires is entirely correct. The opinion not only treats of the remark of Sears, in connection with the argument made as to it in the brief, but it also discusses it as to the possibility of its prejudicing defendant's case; thus covering all that might have been said as to it on the ground of the objection made to it on the trial and in the assignment of error. The testimony of Pearce was not assailed here as being calculated to lead to an excessive verdict; still that it was all proper to go to the jury was affirmed after the most careful consideration. The fact that there were no contractor's profits or architect's fees actually incurred by plaintiff in the construction of the hotel did not render the evidence inadmissible. The question was the value of the property, and all usual or proper items of cost could be considered by the jury, with other proper evidence, in forming their judgment as to what it was worth at the time of the fire, or what it would cost to reinstate the plaintiff in its financial condition, in so far as the same was affected by the destruction of the building.

The testimony of Davis was not urged before us in the connection of former fires, but on another and distinct proposition; and to attempt to do so now is a clear violation of the rule forbidding new positions on an application for rehearing. Urging in the brief the objection made to his testimony as not properly admissible in rebuttal, which objection is disposed of in the twellth subdivision of the opinion, was clearly an abandonment of the point now presented. Besides all this, however, the testimony as to the escape of sparks from this engine is too full, and testified to by too many witnesses, to permit any one to think for a moment that the fact that Davis' testimony related to a different engine,—assuming such to be the case,—could have misled the jury to the injury of the defendant. There was no failure or omission on the part of the court to consider all the testimony bearing on the question of Randolph's not saving furniture, and the responsibility of the plaintiff therefor. We are entirely satisfied with the correctness of the conclusion reached on this point. The question of interest was the subject of most deliberate consideration, and not only has our satisfactiou with the conclusion increased, but

we find the supreme court of Pennsylvania taking practically the same course in the case of Pennsylvania S. V. R. Co. *v.* Zeimer, 124 Pa. St. 560, 566, 571 (decided in 1889). The charges on the subject of locomotive appliances received our full consideration. They were all considered by us, and nothing further need be said than that counsel are mistaken as to the word "general" not appearing in the 23d charge, set out in the 119th assignment of error.

No more extended discussion is necessary. The case has received the fullest attention.

A rehearing is denied.

Fires Set by Locomotives—Presumption of Negligence from Occurrence of Fire.—See Johnson *v.* Northern Pacific R. Co. (N. Dak.), 45 Am. & Eng. R. Cas. 554, note 563; White *v.* Chicago, M. & St. P. R. Co., (S. Dak.), 45 *Id.* 565: Ft. Scott, W. & W. R. Co. *v.* Tubbs, and note, *post*. p, 685.

Same—Sufficiency of Evidence to Rebut Presumption of Negligence.—See Koontz *v.* Oregon R. & N. Co. (Ore.), 43 Am. & Eng. R. Cas. 11, note 28, 29, 30; note 38, *Id.* 345; Chicago & Eastern Illinois R. Co. *v.* Coyett, (Ill.), 43 *Id.* 36; Johnson *v.* Northern Pacific R. Co., (N. Dak.), 45 *Id.* 554.

Contributory Negligence of Property Owner in Neglecting to Guard Against Fire.—See Gram *v.* Northern Pacific R. Co. (N. Dak.), 45 Am. & Eng. R. Cas. 544; Laird *v.* Connecticut & P. R. R. Co., (N. H.), 43 *Id.* 63; Eaton *v.* Oregon R. & N. Co., (Ore,), 43 *Id.* 57; West *v.* Chicago & N. W. R. Co., (Iowa), 38 *Id.* 340, note 341; West *v.* Chicago & N. W. R. Co., (Iowa), 32 *Id.* 339, note 342; Pittsburg, C. & St. L. R. Co. *v.* Hixon, (Ind.), 32 *Id.* 374; Missouri Pacific R. Co. *v.* Bartlett, (Tex.), 32 *Id.* 343; note 35 *Id.* 245; Ft. Scott, W. & W. R. Co. *v.* Tubbs, and note, *post*, p. 685.

Damages for Destruction of Property by Fire.—See White *v.* Chicago, M. & St. P. R. Co, (S. Dak.), 45 Am. & Eng. R. Cas. 565, and cases cited in note 573; Ft. Scott, W. & W. R. Co. *v.* Tubbs, and note, *post*, p. 685.

Proximate and Remote Cause of Fires Started by Railway Locomotives.—See Louisville & N. A. & C. R. Co. *v.* Nitche, (Ind.), 45 Am. & Eng. R. Cas. 532, and cases cited in note 539; Gram *v.* Northern Pacific R. Co., (N. Dak.), 45 *Id.* 544; Marvin *v.* Chicago, M. & St. P. R. Co., (Wis.), 45 *Id.* 540.

In an action for the destruction of property by fire caused by sparks from a railroad locomotive, where the evidence shows that the fire originated on the defendant's right of way and was carried by the wind to plaintiff's property, though other lands intervened over which the fire burned several days and was several times partially subdued before reaching his land, defendant was not relieved from liability on the ground that defendant's negligence was not the proximate cause of the injury. Chicago, St. L. & P. R. Co. *v.* Williams, (Ind., March 19th, 1892), 30 N. E. Rep. 696.

Burning Pasture Fence—Escape of Horses.—A railroad company negligently setting fire to a pasture fence so that horses confined in such pasture escape and are lost, is chargeable with notice that the owner of the pasture would use it for all purposes to which it was adapted, and that he would put stock into it that would be likely to stray off except for the fence. The fact that the horses which escaped had been driven from a remote quarter of the state a few days before and therefore had a propensity to wander off, is no defense. St. Louis & A. T. Co. *v.* McKinsey, 78 Tex. 298.

Degree of Care Required of Railroad Company to Avoid Setting Out Fire.—In an action to recover damages for the destruction of property by fire set by the locomotive of a railroad company, a charge that, in the matter of keeping their right of way free and clear of combustible materials, and in providing their locomotives with suitable spark arresters, the company were only called upon to exercise "reasonable care, skill, and diligence," states a proper rule. Eddy *v.* Lafayette, (C. C. A.), 49 Fed. Rep. 807.

Evidence of Other Prior Fires.—In Hoover *v.* Missouri Pacific R. Co., (Mo., May 25, 1891), 16 S. W. Rep. 480, a witness for the plaintiff testified that, on several occasions, from three to six months before the occurrence of the fire for which the action was brought, he had put out other fires caused by defendant's locomotives on his land along the line of its roads some three hundred yards from the plaintiff's mill which was burned. *Held*, that this evidence was properly admissible, on the theory that such occurrences had a tendency to show negligent management of defendant's locomotives. Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227 and Lester *v.* Hannibal & St. J. R. Co., 60 Mo. 265, overruled.

Action for Injuries Caused by Fire—Sufficiency of Evidence to Sustain Verdict.—There was evidence that, at the point where the fire started on defendant's right of way, there were dry grass and weeds extending up to the track; that passing locomotives frequently dropped coals of fire, which set fire to the ties; that the weather was dry, and the wind was blowing in a direction which would carry fire towards plaintiff's property; and that there was a line of "burnt district" extending from defendant's right of way to plaintiff's land. *Held*, that the evidence was sufficient to sustain a verdict for plaintiff. Chicago, St. L. & P. R. Co. *v.* Williams, (Ind., March 19, 1892), 30 N. E. Rep. 690.

Insurance—Subrogation of Insurer to Rights of Insured.—Where property destroyed by fire communicated from a railroad locomotive is insured, and the insurer pays the loss, he becomes subrogated to the rights of the insured to recover from the railroad company. St. Louis, A. & T. R. Co. *v.* Fire Assoc. of Philadelphia, (Ark., Nov. 28, 1891), 18 S. W. Rep. 43.

Venue of Action for Injuries from Fire—Local Action.—In DuBreuil *v.* Pennsylvania R. Co., (Ind. Jan. 7, 1892), 29 N. E. Rep. 909, it was held that an action against a railroad company for injury to land situated in Cook County, Illinois, cannot be maintained in the adjoining of Lake, Indiana, although the railroad extends through both counties.

Change of Venue Because of Prejudice.—Where, in an action against a railroad company to recover damages for injuries by fire, alleged to have originated on its right of way, through its negligence in permitting combustibles to accumulate there, it appeared that the same fire extended over a considerable area, and that two similar suits against the company for such damages had already been tried and fourteen others were then pending, and facts were stated in numerous affidavits showing that there was among the people of the county where the action was brough much hostility and general prejudice against the company, and one affidavit alleged a combination and conspiracy among the claimants and others to wrongfully charge the origin of the fires to the negligence of the company, and compel it to pay damages, irrespective of justice. *Held*, that under subd. 2, sec. 2622, R. S., a change of venue ought to have been granted. Cyra *v.* Stewart, 79 Wis. 72.

Destruction of Property Owned Jointly—Action for Joint Loss.—Where hay is destroyed by fire negligently set by a railroad's locomotive, and it appears that such hay was harvested by the occupant of the land under a contract with another whereby he agreed to advance the requisite funds, the former to receive one-third of the proceeds, such persons may main-

tain a joint action for the loss of the hay. Eddy *v.* Lafayette, (C. C. A.), 49 Fed. Rep. 807.

Pleading—Facts Sufficient to Constitute Cause of Action.—In an action against a railroad company for damages caused by fire, where the plaintiff alleges in his pleading facts sufficient, which would, if proved, make out a *prima facie* case against the railroad company, under chapter 155 of the Laws of 1885, (Gen. St. 1889, par. 1321), sufficient facts are alleged to constitute a cause of action against the railroad company. St. Louis & S. F. R. Co. *v.* Snaveley, (Kan., Jan. 9, 1892), 28 Pac. Rep. 615.

HAGEN

v.

CHICAGO, DETROIT & CANADA GRAND TRUNK JUNCTION R. CO.

(*86 Michigan, 615.*)

Fires Set by Locomotive—Origin of Fire—Good Order and Proper Management of Locomotive—Question for Jury.—In an action to recover the value of buildings destroyed by fire alleged to have been caused by sparks thrown from defendant's locomotive, the uncontradicted testimony on the part of the defendant that the locomotive was in good order and was properly managed and that the engineer and fireman were skillful and competent, does not warrant the court in treating these facts as established, if they are inconsistent with some established fact in the case, and the court does not err in refusing to take the case from the jury.

Statutory Liability for Fires—Selection of Appliances and Management of Train.—The Michigan statute (How. Stat. § 3378) making railroad companies liable for all loss or damage to property by fire originating from its engines, unless proof is made to the satisfaction of the jury that the machinery, smoke-stack, or fire-boxes of such engines were in good order and properly managed, contemplates the communication of fire and consequent loss and damage notwithstanding the exercise of prudence and care in the selection of appliances, and the management and operation of trains; and it fixes the standard of condition and management, but does not attempt to establish a standard of kind or quality of appliances.

Insurance on Property Destroyed—Evidence.—Where the buildings destroyed by fire communicated from a locomotive engine of a railroad company were insured, and in an action to recover damages for such destruction it appears that the loss has been paid to the plaintiff by the insurer, evidence of the amount of such payment is immaterial.

Duty of Railroad Company as to Adoption of Improved Appliances.—Before a railroad company can be made liable for the destruction of property by fire by reason of its failure to adopt other appliances than those in use by it, such appliances must be shown to have been well and popularly known, and their efficiency must have been demonstrated by actual use.

Negligence in Running Trains at High Speed.—It is the duty of a railroad company to runs its trains as nearly on time as possible, and the running of a way-freight train at a speed of forty miles an hour is not, of itself, negligence.

ERROR to Macomb Circuit Court.

E. W. Meddaugh, (*H. Geer*, of counsel,) for appellant.

Lungerhausen & Erskine, (*Thos. M. Crocker*, of counsel,) for appellee.

MCGRATH, J.—This action was brought to recover the value of certain buildings and contents destroyed by fire, alleged to have been caused by sparks thrown from an engine running upon defendant's road, upon which plaintiff's farm abuts. Plaintiff had judgment, and defendant appeals. Case stated.

Plaintiff's testimony tended to show that the fire occurred September 15th, at about 9 o'clock A. M.; that the buildings burned were located about 160 feet from the tracks; that there had been no rain for about four weeks, and everything was very dry; that there was a high wind, which was blowing with the train, and in the direction of plaintiff's buildings; that the train was running at a high rate of speed; that the engine was laboring very hard; that the firemen had the door of the fire-box open, and was poking the fire; that the poking of the fire would tend to throw out sparks; that, as the engine approached plaintiff's buildings, smoke of a bluish-gray color streaked with red, was seen to roll over the buildings, and, in the course of a few minutes, fire was discovered in the shingle roof of one of the sheds, which spread into the other buildings; that the roof which took fire sloped towards the train as the train approached; that just before it reached plaintiff's place, after the same train has passed, on that morning, fire was discovered in a clover field near defendant's right of way, about half a mile south of plaintiff's buildings, in the direction from which the train came. Defendant's testimony tended to show that the machinery, smoke-stack, and fire-box of the engine were in good order, and were of the most approved kind, the best in use; that they had been examined on the morning of that day, and were examined the next day after the fire, by competent persons, and found to be in good order; that the engineer and fireman were skillful and competent, and were managing the train carefully and skillfully; that the fireman was not poking the fire as it passed plaintiff's premises; that it was not necessary to poke the fire, and that poking the fire would not tend to throw out sparks; that an engine, in good repair and properly managed, could not throw fire from the track to plaintiff's buildings, and that the barn was on fire before the train reached the buildings. The fact and extent of the fire was not disputed, nor was it attempted to be shown that the fire could have originated in any other way.

The first question raised is that the verdict of the jury is not warranted by the evidence; that inasmuch as the testimony introduced by defendant that the apparatus was in good order, and was properly managed, and that the engineer and fireman were competent and skillful, was uncontradicted, those facts should have been treated as established, and a verdict directed for defendant. In the absence of any testimony tending to show that the fire could have happened in any other way, the jury was justified in finding that the fire was started by a spark from the locomotive. Having concluded that the fire was caused in that manner, they were entitled to consider, as bearing upon the question of negligence, not only defendant's testimony as to the condition of the locomotive, the competency and skillfulness of the engineer and fireman, and the proper management of the locomotive on that occasion, but also the testimony as to the poking of the fire, its effect upon the emission of sparks, and in that connection defendant's testimony that it was unnecessary to poke the fire. As bearing upon the question of the condition of the smoke-stack and fire-box, and the management of the locomotive on that occasion, they were entitled to consider the testimony regarding the clover-field fire, and the testimony offered by defendant that an engine in good order, and properly managed, could not possibly throw fire from the track to plaintiff's buildings. The only inference that could be drawn from the testimony relating to the impossibility of the communication of fire from the locomotive to plaintiff's buildings, in view of the circumstances of fire, was that the engine was either not in good order or was not properly managed. Johnson *v.* Chicago & N. W. R. Co., 77 Iowa, 666. Testimony cannot be said to be undisputed, when inconsistent with some other fact or circumstance, either established or regarding which testimony has been admitted. The court very properly declined to take the case from the jury, or to pass upon the conclusiveness of the testimony offered by the defendant.

Defendant's negligence—Condition and management of locomotive.

It appeared that the buildings which were destroyed had been insured, and that the insurer had paid the loss, but the court rejected testimony as to the amount paid as immaterial, and this is assigned as error. The question is ruled by Perrott *v.* Shearer, 17 Mich. 48–55.

Payment of insurance.

The court instructed the jury that, "if you find that the fire was caused by a spark from the engine, the law raises a presumption of liability on the part of the defendant. The burden of proof is then passed upon defendant, in order to escape such liability to show affirm-

Instructions to jury.

atively, to your satisfaction, that the engine from which the fire originated was, at the time in question, properly constructed, and equipped with the best approved appliances for preventing the escape of fire. * * * In regard to the construction of its engine and appliances to prevent the escape of fire and sparks, a railroad company is required to keep constantly in use 'the most approved machinery and apparatus for that purpose on their engines.' * * * (3) If you are satisfied from the evidence that, at the time in question, the defendant's engine was properly constructed and equipped with the best-known and most approved apparatus to prevent the escape of fire therefrom, and that the same was in good repair, as to its machinery, fire-box, and smoke-stack, and the engine and train was properly managed with reasonable and ordinary care and skill by the servants and employes of the railway, then the plaintiff is not entitled to recover, and your verdict should be for the defendant. * * * (4) It is not negligence in a railroad company to run an engine which emits sparks, providing the company has the engine equipped with means and appliances to arrest the escape of sparks, recognised as the best known and in use, and approved as such by experienced operators. * * * (5) If you do so find, then you will consider the question whether the defendant has satisfied you, by a fair preponderance of the evidence, that the engine was equipped as I have stated to you, with proper and the best-known appliances to prevent the escape of fire."

Defendant introduced several witnesses, who testified that the machinery, smoke-stack, fire-boxes, netting, and all the equipments of that engine for providing against the escape of fire and cinders, and providing against the danger of setting fires, were of the most approved order, form, and pattern known, that they were claimed to be the best in use, and that they were in use by the great majority of railroads in this country. The defendant requested the court to instruct the jury that "the engine was in good order, so far as this case is concerned, if at the time it was supplied with the best approved appliances to prevent the escape of fire, and such appliances were in good repair. In view of the fact that it is impossible to prevent the escape of sparks from a locomotive, it is not negligence in a railroad company to run an engine which emits sparks, provided the company has the engine equipped with means and appliances to arrest the escape of sparks, recognized as the best known and in use, and approved as such by experienced railroad operatives. The appliances which a railroad are by law to use, to comply with its duty, are those most efficient to prevent the escape of

sparks of the smallest size, consistently with the successful making of steam."

Duty of railroad company to adopt improved appliances.

While the instructions given were in accord with the defendant's theory of its own duty in the premises as indicated by its proofs and its requests, and for this reason, if no other error appeared, we might hesitate to reverse the judgment, yet the instructions that defendant was "required to keep constantly in use the most approved machinery," of "the most approved pattern," the "best known and most approved apparatus," the "best known appliances," without further explanation, were misleading. The statute provides that "any railroad company building, owning, or operating any railroad in this state shall be liable for all loss or damage to property by fire originating from such railroad, either from engines passing over such roads, fires set by the company employes by order of the officers of said roads, or otherwise originating in the construction or operating of said railroad: provided, that such railroad company shall not be held liable if it prove, to the satisfaction of the court or jury, that such fire originated from fire by engines whose machinery, smoke-stack, or fire boxes were in good order, and properly managed." This statute contemplates the communication of fire, and consequent loss and damage, notwithstanding the exercise of prudence and care in the selection of appliances, and in the management and operation of trains. It fixes the standard of condition and management, but it does not attempt to establish a standard of kind or quality of appliances.

While the degree of care required of a railroad company, respecting the management and operation of its trains, must vary according to circumstances, there must of necessity be some stability in appliances, and railroad companies cannot be expected to be constantly changing appliances, or to instantly apply newly discovered devices, nor can they be required to adopt every new and untried instrumentality, even though subsequent experience may demonstrate the same to be the more efficient. Indeed, the introduction of untried devices may of itself be negligence. The efficiency of an appliance can only be demonstrated by actual experience, and adoption and use are the real tests of approval. In view of our statutes, and other similar statutory provisions which make railroad companies *prima facie* liable, prudent railroad companies naturally adopt appliances which will most effectually protect them from that liability, and at the same time protect their own property, and the general use of apparatus for that purpose grows out of these considerations. No individual should be held to a higher degree of care and pru-

dence, in the selection and adoption of appliances, than that which is generally exercised by prudent railroad men, using appliances for the same purpose. Unreasonable requirements should not be exacted. There should be some degree of security in the use of apparatus. The fact that an appliance is commonly used by prudent railroad men, and has been for a long time, for the same purposes, and has substantially guarded against the danger sought to be avoided, should be a good defense to a charge of negligence because of its use. Wide differences of opinion may exist among those desirous of reaching the same result. Two or more kinds of appliances may be used, each one of which is approved by a number of railroad companies, which are managed by practical and prudent men, and the adoption of each may have been after careful consideration of the merits of all, yet, unless that adoption and approval has some weight, there is no safety in the use of either. In any event, before a railroad company can be made liable by reason of its failure to adopt other appliances, it must be shown that such appliances have been well and popularly known, and their efficiency demonstrated by actual use.

In Hoyt *v.* Jeffers, 30 Mich. 181-192, cited by plaintiff, the rule laid down was applied to the facts of that particular case, and was subjected to qualifications. A mill was set in the midst of a city, and the mill chimney was without any apparatus for arresting the escape of sparks; and the court held that it became the duty of the owner of the mill to avail himself of some such apparatus as experience has shown to be reasonably adequate, if not the most effectual, to prevent the escape of sparks and fire from his chimney, whether such apparatus had ever been previously used upon that particular kind of chimney or not, so long as they are susceptible of being applied, and, if so applied, would operate to prevent or check the escape of such fire and sparks. It was then shown that spark catchers constructed upon the same principle as those long in use, and well and properly known upon other smoke stacks, would, if applied to this chimney, have substantially avoided the danger; and the court say that this was so long and generally known that it was the duty of the defendant to have known it, and to have availed himself of their use. "In fact, I think the true rule is that the defendant, in adopting means to check the flow of sparks, and to avert the danger in question, under the circumstances of this case, was bound not only to adopt the means calculated to avert the danger, but the means which, in the progress of science and improvement, has been shown by experience to be the best; unless, indeed, it be some invention so

recently made as not to be generally known, or which the defendant, by reasonable inquiry for the best means, might not fairly be supposed to have obtained knowledge of, or unless the expense of such particular invention should be so excessive as to render its requirement practically unreasonable, when a less expensive mode of protection, substantially guarding against the danger, might be held sufficient."

In the present case, there was no evidence offered which tended to show that there were other appliances superior in kind to those in use, or even that there were other appliances used for that purpose, much less that there were other generally known and approved devices, which were more efficient, and defendant was entitled to an instruction that it was not negligent in the selection and adoption of its apparatus. The phrase, "the best known appliances," is susceptible of different interpretations. It may be taken to mean the best appliances known, or the best approved or acknowledged appliances, or those appliances which are best known.

Plaintiff offered testimony tending to show that the train was running at the rate of 40 miles an hour; that the weather was very dry, and a high wind was blowing at the time. Defendant requested the court to instruct the jury as follows: "You are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movements of trains. The risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays; that it would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather. Those who establish themselves in the neighborhood of railroads must know that trains are expected to run regularly, and, if there are special risks arising from no want of care in the proper equipments and management of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation." The court gave the last paragraph, but declined to give the first. Defendant's counsel also requested the court to give the following, but the court declined: "The engineer and fireman, in managing the train, are at liberty, and it is their duty, to run their trains as near on time as possible; and in case a way-freight, whose length of stops at stations is necessarily irregular, they are not to be considered negligent by their use of natural and reasonable means to make time." It must be conceded that in operating a railroad it becomes necessary, at times, to make time between given points, and the running of a freight train at the rate of 40 miles an hour for this

Speed of trains.

purpose is not in itself negligence. The law insists, however, that with increased speed must be associated a higher degree of care. Trains must be run with regularity, and with reference to the movements of other trains, in dry weather as well as in wet weather. Uninstructed, the jury was at liberty to find that, although the train may have been properly equipped, the high rate of speed was improper management of the train.

The defendant was entitled to the instructions asked for, and for this error the judgment must be reversed. and a new trial granted, with costs.

CHAMPLIN, C. J., and MORSE and LONG, JJ. concurred. GRANT, J., concurred in the result.

Railroad Fires—Effect of Insurance on Property Destroyed.—See Regan *v.* New York & N. E. R. Co., and note, *ante* p. 590, 603.

Same—Duty of Railroad Company as to Spark Arresters and Other Appliances.—See Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, etc. Co. *ante* p. 603.

Sufficiency of Evidence to Show Origin of Fire—Negligence of Company.—A short time before a fire broke out on land adjoining a railroad right of way, two freight trains passed over the road at short intervals and near to the point where it was claimed the fire was started. Between three and four hours after the fire was discovered a person went over the recently burned district and traced the course of the fire to where he said it "started." The place located by him was at the foot of the railway embankment and within fifteen feet of the track. Here this person testified that he found grass and brush still burning. On the next day another person discovered ashes at the same point. It was proved that the country was very dry and that at and during the time of the fire a furious wind was blowing, which swept the plains and the shocks of burning grass before it with rushing rapidity and to great distances. It was shown by the railroad company that its engines were provided with the best improved fire arresters and that they were in good condition and properly operated. It was also shown that at the point in question the track was down grade and that the engines passed along by their own momentum without the use of steam. There was also proof of the prevalence of prairie fires at the time in question. *Held*, that it could not be said that there was a preponderance of evidence to show that the fire originated from sparks thrown out by the locomotives or that it was kindled through the culpable negligence of the railroad company, and that the evidence did not justify a verdict for the plaintiff. Missouri Pacific R. Co. *v.* Cullers, (Tex., June 16, 1891), 17 S. W. Rep. 19.

Presumption as to Origin of Fire.—Evidence that a fire started in a field at a point about one hundred and sixteen feet from a railroad track a few minutes after a train had passed by, and that no other fire, or person setting fire, was seen near there on that day, is sufficient *prima facie* proof that the fire was caused by sparks from the engine. Greenfield *v.* Chicago & N. W. R. Co., (Iowa, June 3, 1891), 49 N. W. Rep. 95.

Duty of Company to Use Improved Fire Arresters.—In an action against a railroad company to recover damages for injuries caused by fire started by sparks emitted by a locomotive engine, a charge that the railroad com-

pany is bound to use the most improved fire arresters is not erroneous, although the instruction would have been more satisfactory if it had added the words "in use." Missouri Pacific R. Co. *v.* Bartlett, (Tex., May 12, 1891), 16 S. W. Rep. 638.

Defective Spark Arrester—Sufficiency of Evidence to Show Negligence.—Where a statute requires railroad companies to place on the chimneys of their locomotive engines such screens as will prevent, as far as possible, the escape of sparks of fire, a jury, in an action for injuries caused by fire started by sparks from a locomotive, are authorized to infer that a spark arrester was out of order or improperly adjusted, where the evidence shows that, although the locomotive which caused the fire was provided with the most approved form of spark arrester, yet, on the occasion of the fire, large showers of sparks were seen flying from the chimney on adjoining property, and that a few days later an adjoining fence was set on fire by a large quantity of sparks from the chimney of such locomotive. In such case a finding that the railroad company was guilty of negligence is supported by the evidence. Louisville & N. R. Co. *v.* Taylor, (Ky., Oct. 1, 1891), 17 S. W. Rep. 198.

A few moments after a freight train had passed, a mill fifty-two feet from the track was found to be afire on the outside of the roof nearest the railroad. The engine threw sparks as large as a half dollar thirty feet high. The smoke-stack was of a pattern that did not admit of the use of a spark-arrester, and it was shown that when in good order, it would not throw out large sparks. *Held*, that it sufficiently appeared that the smoke-stack was out of order. Hoover *v.* Missouri Pacific R. Co., (Mo., May 25, 1891) 16 S. W. Rep. 480.

SPENCER

v.

MONTANA CENTRAL R. CO.

(*Montana Supreme Court, September 10, 1891.*)

Fires Set by Locomotives—Combustible Material on Right of Way—Construction of Statute.—Under a statute (Comp. St. Mont. 1888, Div. 5, § 719) providing that any railroad company failing to keep its right of way free from dead grass and other combustible material "shall be liable for any damage which may occur from fire emanating from operating the railroad, and a neglect to comply with the provisions of this act in keeping clear any railroad track," the mere failure of a railroad company to keep its track free from accumulations of combustible substances is not sufficient to render it liable, but it must also appear that the damage suffered is traceable to such neglect. To hold the company liable it must also appear that there was sufficient combustible material upon the right of way to indicate to common prudence a danger from fire.

Pleading—Averment as to how Fire was Communicated—Ambiguity.—A simple ambiguity or uncertainty in the allegations of a complaint against a railroad company for destroying plaintiff's property by fire, the ambiguity lying in the fact that the complaint does not show with certainty how the fire was communicated to plaintiff's property, cannot be taken advantage of for the first time on appeal, where, upon a fair intendment of the language used, a cause of action can be made out.

APPEAL from Cascade District Court.

Action by John Spencer against the Montana Central Railway Company for loss by fire. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

McCutcheon & McIntire, for appellant.

Henri J. Haskell for respondent.

HARWOOD, J.—This action was brought to recover the sum of $1,220 damages alleged to have been sustained by plaintiff by reason of the wrongful destruction of 120 tons of hay, 15 cords of wood, and a quantity of grass standing in a field, the property of plaintiff, by fire emitted from defendant's locomotive engine, and communicated to said property by means of dry grass and other combustible matter which was carelessly and negligently allowed by defendant to accumulate and remain on its right of way opposite the place where said property was situate near said right of way, at the time the fire occurred. Case stated.

Appellant contends that the complaint fails to state facts sufficient to constitute a cause of action, and points out as the defect that plaintiff "alleges that the fire was set in grass upon defendant's right of way, but nowhere alleges that by reason thereof or that thereby the fire was communicated to the property of the plaintiff." After alleging the ownership, description, and situation of the property alleged to have been destroyed, the following averments are set forth in the complaint: "That at said time and place the defendant's right of way of said railroad (not exceeding one hundred feet on either side of said railroad bed) was covered with large quantities of dead and dry grass and other combustible material. That on account of defendant not keeping free from dry and dead grass and other such combustible material its right of way aforesaid, not exceeding one hundred feet on either side of its roadbed, and on account of not providing suitable spark arresters and other machinery in operating said road, and by the negligence and carelessness of its officers, agents, servants, and employes in managing the same the defendant's locomotive did at said time and place, and while passing plaintiff's property as above described, emit sparks of fire which set fire to the dead and dry grass on defendant's right of way, which fire was then and there communicated to the said standing grass in plaintiff's inclosure, and to the said hay and wood, and did then and there burn up and totally destroy all of said" property.

The language employed in the complaint to allege the communication of fire from defendant's engine to plaintiff's property cannot be approved. It is subject to the criti-

cism of appellant's counsel, as being ambiguous or uncertain in the averment that the defendant's locomotive emitted sparks which set fire to said dry grass on defendant's right of way, "which fire was then and there communicated to said standing grass in plaintiff's inclosure, and to said hay and wood." The ambiguity lies in the fact that the averment does not show with certainty how the fire was communicated to plaintiff's property. The objectionable averment would undoubtedly have sustained a demurrer on the ground of ambiguity or uncertainty, but no such demurrer was offered by appellant at the proper time. If there is only an ambiguity or uncertainty in the averment this cannot be taken advantage of for the first time in this court. The attempted statement of some essential facts might be found so uncertain or ambiguous as to justify the discarding of the averment altogether. Then it could be said, as appellant contends here, that the pleading fails to state a cause of action. We can conceive of such a case, but the ambiguity would be an extraordinary one. The averment in the complaint which appellant points out as objectionable is aided somewhat by that which goes before, namely, that "on account of defendant not keeping free from dry and dead grass and other such combustible material its right of way aforesaid, * * * and on account of not providing suitable spark-arresters," etc., fire was emitted from defendant's engine, and "set fire to said dead and dry grass on defendant's right of way, which fire was then and there communicated to said standing grass in plaintiff's inclosure, and to said hay and wood." So we think the fair intendment of the averment as it stands considered altogether, is that, on account of "the dry grass and other combustible matter" on defendant's right of way, and the want of proper spark-arresters on the locomotive engine, or thereby, or by reason thereof, the fire was communicated from said engine to said dry grass, and thereby to the standing grass and wood and hay of plaintiff. Although somewhat ambiguous and uncertain, we think that is the fair and reasonable intendment of the averment in question. If such intendment can be reasonably found in the terms used in the averment, we should so construe it. Code Civil Proc. § 100; Bliss, Code Pl. (2d Ed.) § 314. An ambiguous averment is also one which may be cured by answer or proof. Bliss, Code Pl. (2d Ed.) §§ 435–442. In this case appellant answered and defended at the trial, and the testimony as to how the fire which destroy the property described was communicated thereto is given in detail by the witnesses.

Ambiguous pleading—Sufficiency of averment.

We now pass to the consideration of the assignment of

errors alleged to have been committed by the court in giving instructions to the jury and in refusing to give instructions requested by appellant. Appellant complains that the court erred in instructing the jury as to the effect of section 719, fifth division, of the Compiled Statutes. In this regard the court called the attention of the jury to said statute requiring railroad companies to keep the right of way of their roads in this state free from dead grass, weeds, or any dangerous or combustible material; and instructed the jury as to the effect of said statute in the following language: "It makes it the duty of the railroad company to keep their track and their right of way free and clear from any such dead grass, weeds, or other dangerous or combustible material, and upon failure on their part so to do it makes them liable for any damage that may occur from any fire emanating from operating the railroad. It also makes the fact, if it is shown to be a fact, that such dead grass or other dangerous or combustible material is upon the track or upon the right of way, *prima facie* evidence of negligence on the part of any railroad company."

Negligence of company in leaving combustible material on right of way.

This instruction appellant contends is erroneous, because it leaves out of the consideration of the jury the fact as to whether the negligence of the railroad company in failing to keep its right of way free and clear of dry grass, weeds, or other combustible material was the cause of, or contributed to, the damage complained of; in other words, that such instruction left out of consideration the fact as to whether the dry grass or weeds, etc., negligently allowed to remain on the right of way, was the means of communicating fire to the property alleged to have been destroyed through the negligence of defendant. This assignment of error must be sustained. The court instructed the jury, in the instruction recited above, in effect, that upon a failure of the defendant to keep its track free and clear of dry grass, weeds, etc., as required, the statute "makes them liable for any damage that may occur from any fire emanating from operating the railroad." This was plainly error. The full provision of the statute is not stated in said instruction. It provides that "any railroad company or corporation so failing to keep their railroad track free and clear as above specified, and on each side thereof, shall be liable for any damages which may occur from fire emanating from operating the railroad and a neglect to comply with the provisions of this chapter in keeping clear any railroad track and either side," etc. It is observed that the court in part used the language of the statute, but stopped short of stating the two elements which

the statue declares shall combine to fasten the liability on the defendant; that is, a liability for "damage which may occur from fire emanating from operating the railroad, and a neglect" to keep the right of way clear of combustible material. If these conditions set forth by statute are relied upon to sustain an action for damages it must be shown that the damage resulted from the two causes stated,—operation of the railroad, and the failure to keep the right of way clear of combustible matter. This clearly implies that the combustible matter must have operated as an agency in communicating to plaintiff's property the fire emanating from operating the railroad.

Counsel for respondent admits that, if the negligence relied on by him to fasten the liability on appellant for the damage alleged was the failure to keep its right of way free and clear of combustible matter as required by statute, then it must be alleged and proved that through such negligence the damage was wrought. Therefore they contend, and we have held, that the fair import and intendment of the allegations of the complaint was that through or by reason of said dry grass and weeds which plaintiff alleged was on the right of way of defendant at the time and place the fire emitted from defendant's engine was communicated to the property of plaintiff, and the same was thereby destroyed. Now, if it was necessary, in order to show the negligence of defendant, and that through such negligence the alleged damage was done, to allege and prove the existence of the dry grass on the right of way, and that thereby fire was communicated from defendant's engine to plaintiff's property, then it was necessary for the jury, in finding their verdict against the defendant, if found upon that ground, to consider whether this alleged negligence was the cause of the damage; that is, whether the fire was communicated from defendant's engine, through said dry grass or combustible material, to the property destroyed. But the instruction above recited leaves out of consideration the question as to whether the dry grass or other combustible matter on the right of way was instrumental in destroying the property, as alleged in the complaint. If it was not instrumental in such destruction, then the negligence of allowing it there had no part in consummating the damage complained of; nor was it thereby that the property was destroyed, but by other cause. The statute provides that the liability follows where the destruction occurs from fire emanating from operating the railroad, "and a neglect to comply with the provisions of this chapter in keeping clear the right of way." The destruction must occur by means of these two agencies,—the operation of the

road, and the presence of combustible material on the right of way,—in order to make out a liability on these points of negligence. The instruction under consideration assumed that the mere existence of dead grass, weeds, or combustible material on the right of way fastened the liability on the defendant for the damage alleged, without considering whether such combustible material was instrumental in effecting the destruction of the property as alleged in the complaint and as provided in the statute. Nowhere in the instructions did the court recur to the subject, and supply the omission apparent in the instructions above quoted.

These observations are fully in accord with the case of Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 29 Am. & Eng. R. Cas. 117, although the particular point before us was not involved in that case. In that case it is said: "The jury found as fact that the fire in question came from one of defendant's trains, and was caused by the neglect of the defendant in failing to keep its right of way free from dead grass, and that there was sufficient thereof on said right of way in the vicinity of defendant's ranch to make it apparent to a person of ordinary prudence that there was danger of fire therefrom. * * * If there was neglect in this regard, whereby the fire occurred, and the damage was done, it was not very material how perfect and complete the road was equipped in other respects, or how faithful and efficient were its officers."

In the case at bar the court refused to give, upon appellant's request, the following instruction: "If the plaintiff relies upon the fact that the fire start upon defendant's right of way, then he must prove that there was such a sufficiency of combustible material, dead weeds and dry grass, upon such right of way at the place where the fire is alleged to have started as to indicate danger from fire to common prudence, and, failing to prove this, no liability can arise therefrom." The refusal of the court to give said instruction is assigned as error. We are of the opinion that this instruction, or one embodying the ideas therein set forth, should have been given. But no instruction to that effect was given by the court. In addition to the extracts hereinbefore quoted from the Diamond Case, it was observed by the court in that case that "the statute requiring railroad companies to keep their track and right of way free from dry grass, weeds, or other combustible material should receive a reasonable construction. It is a matter of common observation that generally, in Montana, the right of way of railroads has upon them more or less dry grass and weeds; but, if the quantity is not sufficient to indicate danger from

fire to common prudence and ordinary care, then no liability could arise therefrom. The instructions as given cover this proposition." No doubt counsel for appellant predicated the instruction asked for upon the views expressed in the Diamond Case as to the proper construction of said statute. These views are in no way questioned by respondent's counsel as not conforming to reason and authority. We fully approve them, and therefore conclude that the court erred in refusing to give the instruction asked as above recited, or one of like effect. That instruction is qualified by its own terms. It states that, "if the plaintiff relies upon the fact that the fire started on defendant's right of way," etc. This is proper. It does not assume that those points of negligence are the only ones which may be relied on, but says that, if such negligence is relied on, the fair construction of the statute, as explained in the Diamond Case, should be the the rule in this case. But in the case at bar the court refused to give an instruction covering the very proposition in this regard which had been approved in the Diamond Case.

Judgment, therefore, must be reversed, and the case remanded, with direction to sustain appellant's motion for a new trial, and it is so ordered.

BLAKE, C. J., and DEWITT, J., concur.

Fires—Negligence of Railroad Company in Leaving Combustible Material on Right of Way.—See note, 45 Am. & Eng. R. Cas. 575, 576; Gram *v.* Northern Pac. R. Co., (N. D.), 45 *Id.* 544, and cases cited in note 554; St. Louis, I. M. & S. R. Co. *v.* Yonley, (Ark.), 45 *Id.* 568, note 581; Marvin *v.* Chicago, M. & P. R. Co., (Wis.), 45 *Id.* 540.

Negligence may be imputed to a railroad company if it allows combustible material to accumulate along its right of way in such quantity, at such places, and at such seasons as render it liable to become ignited and cause damage to adjacent property. Eddy *v.* Lafayette, (C. C. A.), 49 Fed. Rep. 807.

In St. Louis & S. F. R. Co. *v.* Richardson, (Kan., Dec. 5, 1891), 28 Pac. Rep. 183, it was held that in an action against a railway company to recover damages caused by fire escaping on the right of way of such company, the fact that the dry grass of the previous season was suffered to remain on the right of way is proper evidence for the jury, and they may find negligence from it. Such negligence is ordinarily a question of fact for the jury, and when the fire was caused by the operation of the railroad, and the jury make special findings, *inter alia*, that the negligence of the defendant consisted in the failure to properly clean its right of way, *held*, that under chapter 155 of the Laws of 1885 the defendant was not entitled to judgment upon such special findings when the general verdict was for the plaintiff.

FT. SCOTT, WICHITA & WESTERN R. Co.

v.

TUBBS.

(*Kansas Supreme Court, January 9, 1892.*)

Fire Set by Locomotive—Allegations and Proof—Prima Facie Case.—In an action against a railway company for damages by fire caused by the operation of such railway, under paragraph 1321 of the Kansas General Statutes of 1889, it is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railway to make out a *prima facie* case.

Damages for Burning Meadow—Difference in Value of Land—Instruction.—In an action against a railroad company for negligently burning plaintiff's meadow it is proper for the court to instruct the jury that "in case you find from the evidence that the plaintiff was entitled to recover in this case, you are instructed that the damages to be awarded him should be such as adequately to compensate him for the actual loss or injury sustained; and in determining the amount of injury you should consider the nature and character of the land in controversy, the uses to which it was put, the difference, if any, in its rental value, and you may also allow interest on such damage, if any, you find, from the date of the loss to the present time, at the rate of 7 per cent."

Right to Recover Where Damages Are Not Permanent.—In an action against a railroad company for negligently burning over meadow land, the defendant is not entitled to an instruction that the plaintiff cannot recover unless the injury complained of was permanent in its nature, although he may have sustained other damages as the result of the fire.

Combustible Material on Right of Way—Defective Engine—Special Finding—General Verdict.—Where the plaintiff alleged in his petition that the negligence of the defendant consisted in the omission to keep its roadway clean, and that it negligently allowed dry grass to accumulate and remain on the line of its right of way, and the jury returned a special finding that the fire was caused by a defective engine in allowing coals of fire to drop from the fire-box and ignite the dry grass on the right of way, *held*, that the special finding and general verdict of the jury, were in accord with the allegations of the petition, notwithstanding the fact that the petition contained no statement charging that the engine was defective. The case of St. Louis & S. F. R. Co. *v.* Fudge, 39 Kan. 543, 35 Am. & Eng. R. Cas. 246, distinguished.

Contributory Negligence—Failure to Take Precautions.—In an action under paragraph 1321 of the Kansas General Statutes, the plaintiff is not chargeable with contributory negligence for a mere failure to take precautions against the negligence of the defendant.

Where the Plaintiff Desires to Recover An Attorney's Fee in an action instituted under paragraph 1321 of the General Statutes, he should demand the same in his petition; and when the case is tried by a jury the question of attorney's fees should be submitted, with the other facts in the case, to the jury.

COMMISSIONER'S decision. Error from Greenwood District Court.

J. H. Richards and *C. E. Benton*, for plaintiff in error.

R. C. Summers and *N. W. Hackett*, for defendant in error.

GREEN, C.—This was an action brought by M. C. Tubbs in the district court of Greenwood county against the Ft. Scott, Wichita & Western Railway Company for damages by fire, caused, as is claimed, by the negligence of the defendant in the operation of its railroad. The plaintiff alleged that he owned a half section of land which he used exclusively for the grass grown thereon for hay, and expected to use all of said land for that purpose, except about 40 acres, as such land was well adapted for the growing of hay. The negligence of the defendant is stated as follows: "Plaintiff says that defendant's line of railway runs through, over, and across the north part of said plaintiff's land described, and that on the 29th day of October, 1887, the said defendant, contrary to its duty, and negligently and carelessly, omitted to keep its right of way on plaintiff's land, and on the adjoining land, clear and clean of dry grass, weeds, and other combustible material, and, on the contrary, negligently and carelessly allowed dry grass, weeds, and other combustible material to accumulate and remain on said right of way of said defendant's railway, and neglected to plow a fire-guard along said line of railway, and on said right of way, across plaintiff's land, and across the adjoining land to prevent the spread of fire, or damage therefrom, in the operation of its said line of railroad. That on the 29th day of October, 1887, the defendant, in operating its line of railway and running its engines and cars on said line of railway in Greenwood county, Kan., by and through its servants, employes, and agents, in thereby operating and running said cars and engines thereon, in said county and state, negligently and carelessly permitted said engine of defendant to cast out or emit sparks of fire and coals of fire therefrom, into the dry grass and weeds and other combustible material on defendant's right of way, thereby setting out fire and setting fire thereto, and carelessly and negligently allowing the fire thus set out on defendant's right of way to escape and spread therefrom to other lands, and finally to plaintiff's land and meadow, thereby burning and injuring plaintiff's meadow, greatly damaging plaintiff in the sum of one dollar per acre, or the total sum of two hundred and seventy-five dollars, and without any fault or negligence on the part of this plaintiff, on account of said fire. Wherefore plaintiff asks judgment against defendant

Case stated.

in the just sum of $275, and costs of suit, and for $50 attorney's fees, and all other proper relief."

The railway company filed a motion to make this petition more definite and certain (1) by stating wherein the meadow was damaged; (2) by stating how much, if anything, plaintiff claimed for the burning of the hay growing upon the land; (3) by stating in whether damages were claimed for the burning of the hay growing upon the land at the time of the fire; (4) by stating in what manner the land was damaged, if damages were claimed for injury to the reality. This motion was overruled, and exceptions taken. The defendant then filed a general demurrer to the petition, which was also overruled. The defendant afterwards filed a general denial, and also set up contributory negligence. A trial was had by the court and a jury, and a verdict was returned in favor of the plaintiff for $85. After the return of the verdict, over the objection of the defendant, the plaintiff offered evidence to the court as to the value of attorney's fees in the case, and the court allowed the plaintiff $50 as such attorney's fees. Judgment was rendered for the plaintiff for $135 and costs. A motion for a new trial was filed and overruled.

Six questions are presented by this record: *First*, Did the court err in overruling the motion of the defendant to require the plaintiff to make his petition more definite and certain? *Second.* Did the court err in its instructions to the jury? *Third.* Did the court err in refusing certain instructions asked by the defendant? *Fourth.* Did the court render judgment upon a cause of action not made by the pleadings? *Fifth.* Should judgment have been rendered upon the special findings in favor of the defendant? *Sixth.* Did the court err in rendering judgment against the defendant for attorney's fees? **Questions presented.**

We must answer each one of these questions in the negative, except the last. As to the first, the petition was, we think, sufficient, under paragraph 1321 of the General Statutes of 1889. It might have been more general as to the allegations of damages than it was, and still been good under the statute.

As to the instructions given with reference to the measure of damages, complaint is made of the following paragraph: "In case you find from the evidence that the plaintiff is entitled to recover in this case, you are instructed that the damages to be awarded him should be such as adequately to compensate him for the actual loss or injury sustained; and in determining the amount of injury you should consider the nature and char- **Damages. Instruction.**

acter of the land in controversy, the uses to which it was put, the difference, if any, in its rental value, and you may also allow interest on such damage, if any you find, from the date of the loss to the present time, at the rate of 7 per cent."

It is urged that this instruction was misleading; that under no circumstances would the plaintiff be entitled to recover the difference between the value of the land before and after the fire, and also the difference in the rental value. Perhaps the decrease in the rental value of the land forms the better and more certain rule by which the damages may be estimated, still the principal has been established that, where the injury is done to the real estate itself, the damages may be measured by the difference in the value of the land before and after the trespass, and, in several cases, the amount necessary to restore the property to the condition in which it was before the trespass is a proper measure of damage. 5 Am. & Eng. Enc. Law, p. 36; Willey *v.* Hunter, 57 Vt. 479; Carli *v.* Union Depot, St. etc., Co., 32 Minn. 101; Vermilya *v.* Chicago, M. & St. P. R. Co., 66 Iowa, 606. It is evident from the amount of the verdict that the jury were not misled by the instruction, and hence no prejudicial error was committed.

Upon the third question, complaint is made that the court should have instructed, as requested by the defendant, that the plaintiff could not recover unless the injury complained of was permanent in its nature, although he may have sustained other damages as the result of the fire. The plaintiff did not allege that his meadow was permanently damaged, and the evidence was to the effect that it would take from one to three years to restore the grass to the condition it was in before the fire, so it would not be proper to characterize the injuries as permanent. We think the instruction was properly refused.

Not necessary that injury should be permanent.

As to the fourth question, it will be observed, by a reference to the allegation of this petition, that the plaintiff alleged carelessness in failing to keep the right of way free from grass and other combustible material, and the negligence of the servants of the railway in operating and running its cars and engines.

Allegations of negligence—Special finding—General verdict.

As to the allegation of negligence, the jury made the following special findings of fact: "Question 1. Did the fire escape by accident? Answer. Don't know. Q. 2. Did the fire escape because of the negligence of the employes of defendant while operating defendant's train? A. We do not

know. Q. 3. Did the fire escape by reason of the engine being out of order? A. We think so. Q. 4. State specifically what negligence defendant was guilty of, upon which the jury base the verdict; whether defective engine, condition of right of way, or negligence of its servants in operating the train, or all. State fully in what such negligence, if any, consisted. A. By defective engine, in allowing coals of fire to drop from fire-box and ignite the dry grass on the right of way." The point is now made that the jury specially found that the negligence upon which the verdict is based was a defective engine, and, there being no allegation of the kind in the petition, the judgment of the district court was rendered upon a case not made by the pleadings. The case of St. Louis & S. F. R. Co. *v.* Fudge, 39 Kan. 543, 35 Am. & Eng. R. Cas. 246, is relied upon as being precisely in point. If the present statute (paragraph 1321, Gen. St. 1889) had been in force when the injuries in that case occurred, or when that action was brought, or when the issues in that action were made up, or if the jury had returned the same answers in this case that were returned in that, the position of counsel for plaintiff in error might be correct. But in all these particulars this case differs from that. The Fudge Case was decided, or at least intended to be decided, under the old law, and not under the present law, as embodied in the aforesaid paragraph 1321 of the General Statutes of 1889. And further: In the Fudge Case the jury said that the fire escaped either by the negligence of the servants of the railway company or a defect in the engine; in this case, by defective engine, in allowing coals of fire to drop from the fire-box, and ignite the dry grass on the right of way. The defect in the engine might have been harmless if there had been no dry grass on the right of way. Coals, ashes, and cinders are removed from the fire-box of engines upon the right of way, but this is usually done where there is no combustible matter to be ignited. The dropping of coals from the fire-box might not be a defect in an engine. We think there is sufficient in the special findings, taken in connection with the general findings of the jury, to bring the verdict and judgment within the first paragraph of plaintiff's petition.

As to the fifth question, the plaintiff in error contends that the answers of the jury establish the fact that the railroad company was not guilty of the negligence alleged in the petition. This position, as we have seen, is not tenable, for the reason that the coals of fire dropped from the fire-box, and set fire to the dry grass on the right of way.

It is further urged that the findings show that the plaintiff

was guilty of contributory negligence, for the reason that he did nothing to prevent the spread of fire upon his land. Where a party uses his land as a reasonably prudent man should, and for the purposes for which it is adapted, he is not chargeable with contributory negligence for a failure to take precautions against the negligence of a railway company. 8 Am. & Eng. Enc. Law, p. 16. Chapter 155 of the Laws of 1885 established the rule that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence, so that a mere finding of the jury that the plaintiff did nothing to protect his land would not make him guilty of contributory negligence. In Philadelphia & R. R. Co. *v.* Hendrickson, 80 Pa. St. 182, Chief Justice AGNEW stated the rule under the common law liability as follows: "The conclusion from the case is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but, in order to be held for contributory negligence, must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the company will be guilty of negligence." The same court subsequently held "that it was not contributory negligence for the owner of land along the line of a railroad to allow the accumulation of leaves, brush-wood, and other rubbish on his property. Such an owner of property must run the risk of fires necessarily following the lawful and proper use of the railroad company's locomotives; but that he must guard, in any way or by any means, against the improper or unlawful use of locomotives, is a proposition that cannot be sustained." Philadelphia & R. R. Co. *v.* Schultz, 93 Pa. St. 341. We are not prepared to say that this would be the correct rule in states subject to prairie fires, but it shows the extent to which some courts have gone upon the question of contributory negligence. In this case we are clearly satisfied that the findings of the jury did not establish contributory negligence.

Contributory negligence.

The last question we shall have to answer in the affirmative. After the jury had returned a verdict, the plaintiff asked the court to assess the amount plaintiff was entitled to as attorney's fees. This was error. The question of attorney's fees was one of the issuable facts in the case, and should have been submitted with the other facts to the jury, and been determined in the

Attorney's fee.

same way. Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404; Fort Scott, W. & W. R. Co. *v.* Karracker, 46 Kan. 511. It is recommended that the judgment of the district court be modified by striking out the $50 allowed as attorney's fees; that the judgment for $85, based upon the verdict of the jury, be affirmed; and that the cost of this court be equally divided between the parties to this action.

PER CURIAM. It is so ordered; all the justices concurring.

Damages for the Destruction of Property by Fire.—See Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, T. & M. Co. and note, *ante* p. 603.

Combustible Material on Railroad—Right of Way—Negligence.—See Spencer *v.* Montana Cent. R. Co., and note, *ante* p. 678.

Presumption of Negligence in Actions for Destruction of Property by Fire.—An instruction that the escape of fire from an engine is *prima facie* evidence of negligence, and that it rests on defendant to rebut this, but which omits to charge as to defendant's duty, is cured by a further instruction that defendant is required to use reasonable care and diligence in securing and managing an engine. Hamilton *v.* Des Moines & K. C. R. Co. (Iowa, Dec. 17, 1891), 50 N. W. Rep. 567.

The fact that fire is communicated by a passing locomotive is *prima facie* evidence of negligence. Eddy *v.* Lafayette (C. C. A.), 49 Fed. Rep. 807.

Sufficiency of Proof to Rebut Presumption of Negligence.—Where it is proved that the fire was caused by a spark from the engine, uncontradicted evidence to the effect that the engine was supplied with the best appliances to prevent the escape of fire, that it was in good repair, and that it was not negligently handled, is not sufficient to justify a direction to find for the defendant, since the question whether this evidence disproves the presumption of negligence arising from the fact that the fire was started by a spark from the engine is for the jury. Greenfield *v.* Chicago & N. W. R. Co., (Iowa, June 3, 1891), 49 N. W. Rep. 95.

In an action against a railroad company for loss or damage suffered by the plaintiff by fire caused by the defendant in the operation of its railroad, proof that the fire was so caused is, under the provisions of chapter 155 of the Laws of 1885, *prima facie* evidence that it was so caused through the negligence of the railroad company; and it then devolves upon the railroad company to show, not only that its appliances to prevent the escape of fire were sufficient and in good order, and that its engineer was a competent and skillful engineer, but also that there was no mismanagement or negligence on the part of any of its servants or agents causing the fire. Ft. Scott, W. & W. R. Co. *v.* Karracker, 46 Kan. 511.

Contributory Negligence—Efforts to Protect Property.—In an action against a railroad company for the negligent burning of hay it appeared that the hay was burned in ricks while plaintiff was making hay in the vicinity, and that the men so employed were keeping a constant lookout for fires, and had two water wagons on the field. *Held*, that the court properly refused a charge based upon the assumption that plaintiffs did not use "any effort to protect the hay." Eddy *v.* Lafayette, (C. C. A.) 49 Fed. Rep. 807.

It is not contributory negligence *per se* for one to place cotton on a platform constructed by a railroad company for the purpose of receiving freight, and to leave it there without watch. St. Louis, A. & T. R. Co. *v.* Fire Assoc. of Philadelphia, (Ark., Nov. 28, 1891), 18 S. W. Rep. 43.

In an action against a railroad company to recover damages for the destruction of property by fire, it is error for the court to instruct the jury that if both parties to the suit were guilty of negligence, then the negligence of one party should be balanced as against the negligence of the other, and the jury should find for the party least guilty in this respect. The doctrine of comparative negligence is not recognized. Prescott & A. C. R. Co. *v.* Rees, (Ariz., Jan. 16, 1892), 28 Pac. Rep. 1134.

Measure of Damages for Property Destroyed by Fire.—In an action to recover for hay destroyed by fire set by defendants' locomotive, an instruction that the measure of damages is the market value of the hay when burned, with interest from such time, is erroneous in not leaving to the jury any discretion as to withholding or allowing interest, but is no ground of reversal, where it appears that the jury did not, in fact, allow interest. In case there is no local market value, the value is properly fixed by the value at the nearest market, deducting the cost of transportation. Eddy *v.* Lafayette, (C. C. A.), 49 Fed. Rep. 807.

Where witnesses use the words "fair value" as synonymous with "market value" or "real value" of property in dispute, such evidence is not incompetent to go to the jury for the purpose of determining the value of the property. Ft. Scott, W. & W. R. Co. *v.* Jones, (Kan. Feb. 6, 1892), 28 Pac. Rep. 978.

Measure of damages for the destruction by fire of growing timber is the difference between the value of the land before and after the fire, and not merely the value of the timber for cord wood or lumber. Greenfield *v.* Chicago & N. W. R. Co., (Iowa, June 3, 1891), 49 N. W. Rep. 95.

Damages for Destruction of Trees—Evidence As to Difficulty in Growing Other Trees.—Where the property destroyed by the fire is trees, it is not error to permit a witness to testify that it would be difficult to grow trees in the place of those destroyed by reason of the shade of other trees, since the value of the trees may have been in some measure dependent upon the difficulty or cost of supplying their place by other trees. Leiber *v.* Chicago, M. & St. P. R. Co., (Iowa, Dec. 16, 1891), 50 N. W. Rep. 547.

Evidence that Property Was Worth More Before Than After Fire.—In Hamilton *v.* Des Moines & K. C. R. Co., (Iowa, Dec. 17, 1891), 50 N. W. Rep. 567, the fire burned over a meadow and orchard. The evidence did not show a total destruction of the fruit trees in the orchard or the grass in the meadow. The plaintiff, testifying as a witness, was permitted to state that the meadow, not the land, was worth three dollars or four dollars per acre before the fire, and one dollar per acre afterward. Another witness testified as to the difference in value of the trees in the orchard. The defendant objected to this evidence on the ground that it did not disclose the correct rule of damage, and insisted that the true measure of damage was the cost of restoring the meadow to its prior condition. *Held*, that this rule does not prevail when there is simply injury to meadow and trees and not a total destruction. The court said: "It is obvious that if the trees and grass were of some value in their condition after the fire, defendant should be allowed the benefit of that value in estimating the damages—compensation—to which plaintiff is entitled; and surely there is no error of which it may complain in allowing it such benefit. It is very plain that the cost of restoration might exceed the amount of damages when there was not a total destruction of the grass and trees. We conclude that no error is shown to the prejudice of defendant in the admission of the evidence under consideration."

Insurance on Property Destroyed By Fire—Reduction of Damages.—In an action to recover damages for property destroyed by fire, where the defendant (as tending to show a motive on the part of plaintiff to cause the fire),

proves that plaintiff received payment of an insurance policy on the property, and the court instructs the jury, that this cannot be considered in reduction of damages caused by defendant's negligence, the plaintiff cannot complain. Brookhaven Lumber & Mfg. Co. *v.* Illinois Central R. Co., 68 Miss. 432.

WHEELAN

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(*Iowa Supreme Court, May 16, 1892.*)

Injury to Employe—Moving Train Striking Section Hand—Circumstantial Evidence As to Negligence.—A section hand doing track work on a railroad stepped to the side of the track to get out of the way of an approaching train running at the rate of 25 to 30 miles an hour. The side on which he stood was the inside of a curve where the ground sloped away from the track. He held a crowbar in his hands with one end resting upon the ground, and leaned forward upon it. His feet were about five feet from the track and the end of the bar, upon which he was leaning, was considerably nearer. After all but a few cars of the train had passed him, the other men in the gang noticed him going up and being carried along in the air, and when he fell he was several feet away from the point where he had been standing. The crowbar had been forced up against his neck and jaw, and when picked up he was dead. No one saw anything hit him or the crowbar which he held. Among the cars composing the train was what was known as a "stone-dump" car, the doors of which were hung on hinges at the top. In an action to recover damages for the death so occurring the plaintiff's theory of the accident was that the door of this car, being defectively fastened, swung open and struck the crowbar in the deceased's hands, thereby causing his death. The evidence showed, however, that at the last station before reaching the place of the accident the door of this car was put up and fastened, and at the next stop the door was found to be still up. The portion of the car door, which, according to plaintiff's theory, struck the crowbar in the hands of the deceased, was a heavy band of iron; but. on the trial, the crowbar was offered in evidence and there was no mark upon it. *Held*, that the evidence did not sustain the plaintiff's theory, and that there was nothing to show that the defendant's negligence contributed to produce the injury complained of.

Instruction As to Value of Circumstantial Evidence.—The court, in charging the jury with reference to circumstantial evidence, said: "This kind of evidence, when strong and convincing, is often the most satisfactory from which to draw conclusions of the existence or non-existence of a disputed fact." *Held*, that this instruction was not open to the objection that a higher value was placed on presumptions or inferences than on positive and direct testimony.

Damages for Death—Worth of Decedent's Life to His Estate.—In actions to recover for the wrongful death of another the damages should be lim-

ited to the present worth of decedent's life to his estate; or in other words, compensation should be awarded for the actual pecuniary loss to such estate. In estimating such damages the jury are entitled to consider the expectancy of the life of the deceased, the nature of his calling, the wages he was receiving, and his physical condition and habits of industry.

Proof of Expectancy of Life.—In an action for the wrongful death of a young man, nineteen years and ten months old, it is error to permit the plaintiff to show the expectancy of life of deceased at the assumed age of twenty-one years.

APPEAL from Johnson District Court.

Mills & Keeler, for appellant.

M. P. Smith and *Ranck & Wade*, for appellee.

KINNE, J.—1. This action is brought by the plaintiff, as the assignee in trust of the administrator of the estate of William Doyle, deceased. It appears that the intestate, William Doyle, was on August 3, 1888, in the employ of the defendant as a section man or track repairer on its line of railway running from Marion to Ottumwa, and on that part of said line situated in Iowa county, in the vicinity of the stations of North, English and Parnell. That on said day, and while engaged in said occupation, at the place above named, a freight train of defendant came by, going northeastward, at a rapid rate of speed, and among the cars composing said train was what is known as a "stone dump," the doors of which were hung on hinges at the top. Said car doors were from 12 to 15 feet long and 3 feet wide, and, when properly secured at the bottom, said doors sloped inwardly from the top. That these doors, except when opened to allow the stone and dirt to fall out, were arranged to fasten at the bottom by an iron strap, leaving an opening which passed over a staple, and was to be secured by a straight iron pin, which passed through the loop of the staple. It is claimed that the strap should have been secured by a hook passed through the loop of the staple, which would be held in place by its own weight, and the weight of a chain attaching it to the car; and that the defendant in using the pin fastening was careless and negligent. That the pin, when thus placed through the staple horizontally, was easily shaken from its place, thus leaving the door free at the bottom to swing back and forth from the side of the car, which it did several feet when the train was in motion. That while left in such unsafe condition, and as the train was passing by where said Doyle and others had been at work, the door on the east side of said stone dump car suddenly swung outward toward where deceased was standing, and struck an iron bar, which he was leaning upon, with such force as to

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drive it against his neck and breast, killing him instantly. It is averred that deceased was not guilty of any negligence which contributed to produce his death, and that his death was caused by carelessness and negligence of the defendant, as above stated. Deceased was nearly 21 years old, healthy, and of good character and habits. The defendant files a general denial, and specifically denies the negligence charged.

2. When the train passed which is alleged to have killed Doyle he was standing on the east side of the track, which was inside of the curve. He was leaning forward on a crowbar, the bottom of which rested upon somewhat higher ground than did his feet, and was nearer the track. He held the top of the bar in both hands, and about opposite his left breast. He was standing on the sloping top or edge of the embankment, and facing towards the track. There is some conflict in the evidence as to how far from the rail the deceased was standing when the accident occurred, but plaintiff's witnesses put it at 5 feet. The dump on which he was standing was 7 feet high, and the bar he was leaning upon was nearly 5 feet long, and weighed 20 pounds. The train was running from 25 to 30 miles an hour when it passed deceased. When the train was seen approaching, the section foreman told his men to get out of the way, and deceased, the foreman, and three others stepped to the east side of the track to let it pass, and one man, James Doyle, stepped to west side of the track. The men on the east side of the track stood in the following order: Furthest north, Cronin, the foreman; 100 feet south of him, the deceased; 5 or 6 feet south of deceased, Costello; about 30 feet south of Costello stood McDonnell; and Flannagan was 5 or 6 feet south of him, the nearest to the approaching train. When the foreman gave the warning the train was 600 feet distant. As the train approached, Flannagan was looking south, and did not see the accident. McDonnell was facing north, and saw deceased prior to and when he was killed. Cronin saw deceased fall. So did Nichols, a brakeman on the train. No one saw anything hit him, or the bar which he held. The witnesses who saw the accident say that, when all but a few cars had passed deceased, they noticed him going up and being carried along in the air, and when he fell he was several feet north of the point where he had been standing. The crowbar seemed to have been forced up against his neck and jaw, and through between his jaw bones. His right arm was broken. The bar was lying at his side when he was picked up after the train passed.

3. We have stated the facts quite fully, owing to the pe-

culiarity of the accident, and the fact that nothing was seen to strike the deceased, or the bar which he held. Plaintiff insists that defendant's negligence caused the injury, and that the door heretofore referred to swung out and struck the bar which deceased held, and thus killed him. The evidence shows without conflict that the train consisted of some 20 or more cars,—a caboose in the rear, then 5 box cars immediately ahead of the caboose, and then 4 stone dumps ahead of the box cars. The first stone dump next to the box car was No. 18,499. That the doors of the stone dump cars were not down, loose, or swinging when the train reached Parnell, the first station north of the point of the accident. That the door on this car, 18,499, was fastened at North English, the first station south of the point of the accident. That the train made no stops between North English and the place of the accident, two and one-half miles. That the door of 18,499 was fastened with an iron pin attached to a chain. That this same door was down at Sigourney, at Williamsburg, and at North English, and in each case it was fastened up.

Upon these facts plaintiff bases his claim that defendant's negligence caused the death of Doyle. The claim rests only on the presumption that while it is shown this door was put up and fastened at North English, two and one-half miles south of the point where the accident occurred, it must have got loose, swung out, and hit deceased, notwithstanding it is shown without conflict that the same door was up and closed at Parnell, the next station north of the place where the accident occurred. It may be conceded, at least for the purposes of this case, that the defendant was negligent in running a car with a door so defectively fastened as to come loose and fall down as this door is shown to have done. But that is not sufficient to fix a liability on the defendant. It must appear that its negligence caused the accident complained of, and that deceased did not contribute to produce the result. It is an elementary principle of law that a condition or state of things once established by direct proof is presumed to continue as before until the contrary is shown, or a different or stronger presumption raised. 1 Greenl. Ev. (12th Ed.) § 41. We may then presume that the door, having been fastened at North English, remained so, unless there is evidence sufficient to overcome such presumption. Against this presumption, and the fact that the door was found up in its place at the next station north of the place of the accident, plaintiff asks us to presume that mean time, and just at the

No evidence to justify presumption that car door was loose.

instant of the accident, the door became loose, swung outward, hit the bar which deceased held in his hand, and killed him.

Are we justified in so presuming from the evidence? If the evidence did not disclose the fact that the door in question had been loose and swinging several times prior to the accident, and once after it, on the same trip, counsel would not think of urging that the hasp thereof was the cause of the accident; but such fact is the basis of the presumption on which defendant's liability is predicated. If it was not shown that the door was fastened at the nearest station south of the point of accident, and that it was up in its place at the next station north of it, the jury might well have presumed, in view of the other evidence, that it caused Doyle's death. It does not appear from the evidence as to whether or not the train stopped immediately after the accident. If it did, surely some of those present would have noticed the fact, if the door was loose and swinging. As no such evidence appears, we may presume that the train did not stop, or, if it did, that no one saw the door loose or down. The iron which plaintiff claims struck the bar is shown to have been about two inches wide and nearly an inch thick. The evidence shows that the train was running from twenty-five to thirty miles an hour, and yet the bar which deceased held, and which was produced before this court during the oral argument in this case, shows no dent or other indication of having been struck by anything. It is inconceivable how such an iron, two inches wide and an inch thick, which was attached to a train running twenty-five to thirty miles an hour, should have struck the bar in decedent's hands, and left no mark. It must be conceded, we think, that deceased was in some manner killed by the train. The evidence shows that there were no cars in the train of unusual width; that there was nothing on the train extending out beyond the sides of the cars.

4. The court below, in the seventh division of his charge, among other things said to the jury that "to justify you in finding that deceased was killed by a swinging door striking a crowbar, as claimed by plaintiff, it is necessary not only that the circumstances should all concur to show that he was so killed, but that they are inconsistent with any other rational conclusion." And again, in the seventh division of the charge asked by defendant, and given, the jury were told: "The jury cannot conjecture or presume that a door was down and swinging, or that it swung outward and caused the accident. To warrant the jury in finding that such door was down and caused

Circumstances not consistent with plaintiff's theory of case.

the accident, the facts and circumstances in evidence must reasonably and fairly show that such dump car door was actually down and swinging, and that it swung outward, and hit William Doyle, or the iron bar he held, and thus caused the accident; and it must exclude any fair inference or presumption that the accident was caused in any other manner or by any other means."

These instructions were the law of the case, and the jury were bound to follow them. Can it be said that the circumstances in this case "all concur to show" that Doyle "was so killed?" Are they inconsistent with any other rational conclusion? Do the "facts and circumstances in evidence reasonably and fairly show" that the door was down, and that it caused the accident? And do they exclude "any fair inference or presumption that the accident was caused in any other manner or by any other means?" We think not. In the absence of all evidence that the door was loose, down, or swinging at the time of the accident; in the absence of any direct evidence as to what hit the bar or Doyle; with uncontradicted evidence that at the last station the door was put up and fastened, and found up at the next stop,—might we not be as fully justified in presuming that Doyle, whose bar was from a foot to two feet only from the train, lost his footing, fell towards the train, (as he was leaning that way,) and was struck by a car, and thus killed? Is it not probable, and is it not consistent with the evidence, to presume that standing, as he was, on a sloping embankment, leaning on the bar, his body inclined towards the train, and at most, as appears from the evidence, not over two to three feet from the cars as they passed, that he lost his footing, or was by the suction created by the rapidly moving train drawn towards it, and struck by it? It seems to us such presumptions are as fair and reasonable as those which are indulged in by plaintiff to sustain this verdict. In Asbach *v.* Chicago, B. & Q. R. Co., 74 Iowa, 250, it is said: "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well-settled rule." It seems to us that we may reasonably draw other conclusions as to the cause of this injury from the facts in evidence than those contended for by plaintiff. "Verdicts must have evidence to support them, and must not be founded on mere theory or supposition." Bothwell *v.* Chicago, M. & St. P. R. Co., 59

Iowa, 194, 7 Am. & Eng. R. Cas. 750. A jury will not be permitted merely to conjecture how the accident occurred. Cumberland & P. R. Co. *v.* State, 73 Md. 74. And it is said that "in matters of proof we are not justified in inferring from mere possibilities the extent of facts." Baltimore & O. R. Co. *v.* State, 71 Md. 590. We have examined the cases cited by plaintiff, from this and other courts, but are unable to see how they can be held applicable, under the peculiar facts in the case at bar. We are unable to find that defendant's negligence contributed to produce the injury complained of.

5. Appellant objects to that part of the seventh division of the charge of the court referring to circumstantial evidence, which is thus stated: "This kind of evidence, when strong and convincing, is often the most satisfactory from which to draw conclusions of the existence or non-existence of a disputed fact." We do not think this instruction is open to the objection urged by appellant, as placing a higher value upon presumptions or inferences than upon positive and direct testimony. Furthermore, the instruction is fully sustained by the authorities. In State *v.* Moelchen, 53 Iowa, 310, 71 Md. 590, an instruction was in this language: "Strong circumstantial evidence, in cases of crime, is often the most satisfactory of any from which to draw the conclusions of guilt;" and the court said it was not objectionable, and was in accord with the views of the ablest writers upon the subject. "In both cases [civil and criminal] a verdict may well be founded on circumstances alone, and these often lead to a conclusion far more satisfactory than direct evidence can produce." 1 Greenl. Ev. § 13: Com. *v.* Webster, 5 Cush. (Mass.) 295.

Instruction as to circumstantial evidence.

6. It is contended that the court erred in the fifteenth paragraph of its charge given to the jury in stating the rule as to damages. That part objected to reads thus: "In arriving at the amount thereof [damages] you will consider the evidence before you of the expectancy of life of the deceased; the nature of his vocation or calling; the wages he was receiving at the time of his death; and, in connection therewith, his physical condition and habits of industry—as grounds of estimating the probable pecuniary benefit to the estate of the deceased had his life continued, *and from such evidence, and none other, arrive at the amount of plaintiff's recovery*, but you will not allow anything for probable earnings of deceased until after he would have arrived at the age of twenty-one years." The objection is specially directed to that part of the instruction

Rule as to damages—Loss to deceased's estate.

which is italicized, and it is insisted that the rule in this state in such cases is that recovery is limited to the "actual pecuniary loss to the estate." See Donaldson *v.* Mississippi & M. R. Co., 18 Iowa, 290; Rose *v.* Desmoines Valley Co., 39 Iowa, 255. It is said that under this instruction the jury could only consider the gross earnings of the deceased. We think the thought of the instruction was to guard the jury against considering matters not in evidence before them, not to prevent them from considering all the evidence in the case. It may be considered that it would have been better if it had presented the rule more fully, but, as we hold it was correct as far as it went, defendant, if it desired the matter more fully represented, should have asked an instruction, and having failed to so do, cannot now object.

It is said by plaintiff that this court has never gone so far as to hold that the amount of the recovery should be limited to what the net earnings of the deceased would have been had he lived. This court has frequently announced the rule as to damages in these cases to be compensation for the actual pecuniary loss to the estate of deceased. Donaldson *v.* Mississippi & M. R. Co., 18 Iowa, 290; Rose *v.* Des Moines Valley R. Co., 39 Iowa, 256. We think the rule, to state it more definitely, is that damages should be limited to the present worth of decedent's life to his estate. Simonson *v.* Chicago, R. I. & P. R. Co., 49 Iowa, 91; Beems *v.* Chicago, R. I. & P. R. Co., 58 Iowa, 158, 10 Am. & Eng. R. Cas. 658; James *v.* Richmond & D. R. Co., 92 Ala. 231, 48 Am. & Eng. R. Cas. 522; Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335. In determining this present worth, evidence of his age, probable duration of life, habits of industry and sobriety, health, means, business, earnings, skill in his business, whether he was married or single, and his ability to labor is admissible as bearing upon the question of damages. Simonson *v.* Chicago, R. I. & P. R. Co., 49 Iowa, 91; Beems *v.* Chicago, R. I. & P. R. Co., 58 Iowa, 158, 10 Am. & Eng. R. Cas. 658; Central R. & Banking Co. *v.* Rouse, 80 Ga. 442; Louisville & N. R. Co. *v.* Orr, 91 Ala., 548. The present worth is "the actual pecuniary loss to his estate," as near as can be measured by a money standard. It seems to us it is neither just nor equitable to sum up the probable gross earnings for a whole lifetime, ignoring the items of the necessary food, clothing, and the like; also giving no consideration to the fact that old age and sickness may impair ability to labor and produce; and hold that said gross sum is the measure of recovery. The real value of the earnings of deceased to his estate may also be said to be the present worth of his life. It is not possible to arrive at this exactly, yet, if due consideration is given to the matters

heretofore stated, and if from his gross earnings are deducted his necessary expenses, we shall approximate more nearly, at least, to the actual pecuniary loss to his estate. In McAdory *v.* Louisville & N. R. Co., (Ala.) 10 South. Rep. 507, this question was presented; and, while we do not wish to be understood as approving of all that is said in the opinion in that case, yet it will be found to contain an able and exhaustive discussion of this question of damages.

7. Defendant objects to the refusal of the court to submit to the jury certain special interrogatories asked by him. Counsel in argument only considered some of them. As to the 2d, 3d, and 5th interrogatories, it may be said they related to facts about which there was no dispute, and were properly refused; and generally, as to all of them, we may say, in view of the conclusion we have reached on another branch of the case, we need not further consider them.

Special interrogatories.

8. Against defendant's objection, plaintiff was permitted to show Doyle's expectancy of life at the assumed age of 21 years. This, we think, was wrong. Doyle, at the time of his death, was 19 years and 10 months old, and his expectancy of life should have been based on his age at the time of his death, not to begin at a future date. The court, however, properly instructed that his estate could only recover for probable loss after his majority. We think, however, that defendant's objection, as made in the court below, was not sufficiently definite, in that it did not with certainty direct the attention of the court to the objection now argued.

Doyle's expectancy of life.

9. Many other errors are assigned. The question of decedent's negligence is elaborately discussed by counsel. The conclusion heretofore reached, that there was no negligence shown on part of the company, renders the consideration of these other assignments of error unnecessary.

For the errors pointed out the judgment of the district court is reversed.

Damages in Action for Death—Worth of Decedent's Life to His Estate.—See James *v.* Richmond & D. R. Co., (Ala.), 48 Am. & Eng. R. Cas. 522, note, 528, *et seq.*

Action for Death—Evidence as to Expectancy of Life.—See Galveston, H. & S. A. R. Co. *v.* Arispe, (Tex.), 48 Am. & Eng. R. Cas. 350. Hunn *v.* Michigan Cent. R. Co., (Mich.) 41 *Id.* 452; note 463. Gulf C. & S. F. R. Co. *v.* Compton, (Tex.), 44 *Id.* 637; Scheffler *v.* Minneapolis, etc. R. Co. (Minn.) 19 *Id.* 173; Burlington, etc. R. Co. *v.* Coates, (Iowa), 15 *Id.* 265.

ZOUCH

v.

CHESAPEAKE & OHIO R. CO.

(*West Virginia Supreme Court of Appeals, April 16, 1892.*)

Carriers of Live Stock—Limitation of Liability—Agreement Fixing Value of Horse.—A common carrier may, by special agreement, just and reasonable in itself, and fairly made between itself and the consignor of a horse at the time of the shipment, fix the value of such horse, upon consideration that the rate of charges for transportation shall be commensurate with the value of the horse thus ascertained, and may also limit its liability in case of loss to the amount thus agreed upon, even though the loss may be the result of negligence on the part of the carrier, provided such negligence be not gross, wanton, or willful, but cannot wholly exempt itself from liability for loss resulting from negligence.

Same—Estoppel of Shipper to Recover Higher Valuation Than That Fixed.—A common carrier is entitled to be fairly informed as to the value of the property confided to his care; and where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from claiming or recovering another and higher valuation after the loss occurs, although said loss may be the result of negligence on the part of the carrier, provided the same is not gross, wanton, or willful.

LUCAS, P., dissenting.

ERROR to Cabell Circuit Court.

On the 16th day of June, 1890, H. J. Zouch brought an action of trespass on the case in the circuit court of Cabell county against the Chesapeake & Ohio Railway Company, claiming $175 damages by reason of the loss of a certain horse which was delivered to the defendant, as a common carrier, to be safely carried from the city of Huntington to Brownstown, which horse was alleged to be of the value of $175, and to have been lost by the carelessness and negligence of the defendant. The defendant pleaded not guilty, a jury was waived, and the matters in issue were submitted to the court; said court finding for the plaintiff, and assessing his damages at $175, and rendering judgment for that amount, to which ruling and judgment of the court the defendant excepted, and tendered its bill of exception, which contains the following agreed state of facts, to wit:

"That on November 27, 1889, the plaintiff, H. J. Zouch, had shipped one bay mare by J. A. Hughes, his agent, to S. S. Vinson, of Brownstown, W. Va., which contract of shipment or bill of lading is hereto attached, and made part of

the agreed state of facts, and the plaintiff, H. J. Zouch, was the owner of said mare mentioned in this bill of lading, and that the said J. A. Hughes made said shipment for him; that the actual cash value of said mare was one hundred and seventy-five ($175) dollars; that the freight train upon which the mare was shipped went through the Guyandotte bridge across Guyandotte river, and the mare was killed in the wreck between Huntington and Brownstown, and was never delivered to the consignee, nor has the consignee or the owner, the plaintiff in this case, ever received any compensation for the loss of said mare; that there was no representative of the owner of the stock on the train or in attendance when the mare was killed, and claim for said loss was duly made in writing, within ten days of its occurrence, to the general freight agent of the defendant, which claim was disallowed and not paid by the defendant; and that if the horse had been shipped at full rate the freight upon the horse would have been $7.00, and that upon the valuation of $100 the freight was $3.25."

The bill of lading was attached to said agreed statement of facts, and reads as follows:

"(Form 266 F.) Chesapeake & Ohio Railway Company. Live-Stock Contract. Huntington Station, Nov. 27, A. D. 1889. When stock is from river points, agent at Huntington will fill in the numbers of the cars into which it is loaded. It is hereby agreed by and between the Chesapeake & Ohio Railway Company, party of the first part, and J. A. Hughes, party of the second part, that the party of the first part will carry live stock without limiting its liability by contract, at its regular tariff rates, and that it will forward the same at greatly reduced rates where certain risks, duties, and liabilities are assumed by shippers, as hereinafter specified. It is further agreed that in the present instance the party of the second part elects to avail himself of the reduced rate, and has delivered on the cars of the party of the first part the following described live stock, to wit:

Consignee and destination.	Description of stock.	Car Nos., Wt.
S. S. Vinson, Brownstown, W. Va.	1 gray horse, 1 bay mare,	3,000
Care— Mr. Meadows.	2 saddles and bridles,	100
Charges, $———. (Original.)	(Released.) C. & O. 2798.	

"And in consideration of the same being shipped, and the person in charge thereof being carried on the terms and conditions hereinafter mentioned, the party of the first part agrees to forward the same as far as its line extends towards or to point of destination, and there deliver same to the consignee or the next carrier in the route, and guarantees that the freight thereon, from point of shipment to destination, shall not exceed the reduced rate of 25c. per 100 lbs., and agrees to carry free on the train with said stock, to take care of same, the persons below named as in charge thereof, not to exceed one for one or two cars, two for three or four cars, and three for five or more cars, at their own risk of personal injury, except when caused by the gross negligence or willful misconduct of the party of the first part in forwarding the train with said stock; this contract entitling them to ride on the train carrying said stock only. In consideration of which the party of the second part agrees that he will load and unload said stock at his own risk and expense, take the entire care and control of same on the trip, feed and water the same at his own risk and expense, in case of delay from any cause whatever, and at proper intervals on the route see that the cars are in good condition, properly loaded and securely fastened, and that he does and will assume all risk, and agrees that party of the first part shall not be held responsible for any loss or damage which may occur in loading, forwarding, or unloading said stock, either from overloading, heat, suffocation, disease, weakness, getting down or injured or killed in the cars, viciousness, injuring or killing each other, want of care, food, or water, remaining too long in the cars, escapes from any cause, delays caused by fire, storms, obstructions of tracks, broken rails, failure of machinery or cars, want of fuel or water, or any other cause incident to railroad transportation, except fraud or gross negligence in forwarding the particular cars in which said stock is loaded. Intending hereby to engage the party of the first part to forward said stock over its road, but not to hold it responsible in any manner for the care or safety thereof, or of the persons traveling therewith, unless arising from fraud or gross negligence, as above specified. The party of the second part further agrees, for the consideration aforesaid, that he will in no event hold the party of the first part responsible for any loss, damage, or injury whatever to said stock which may occur beyond its own line, and in case of any loss or damage on its line, for which the party of the first part may be responsible, under this contract, such responsibility shall be and is hereby limited to $100 for each horse, mule, stallion, or jack, $50 for each cow,

steer, or bull, and $20 for each other animal, whether such loss or damage exceeds such sums or not; and all loss and damage which may occur to said stock, from whatever causes, for which claim is not made in writing within ten days of its occurrence, to the general freight agent of the party of the first part, is hereby released and forever discharged. The party of the second part further agrees that he fully understands and assents to the terms of this contract, and that the same shall apply to each and every one of the carriers in the route to destination. In witness whereof the parties hereto have hereunto set their hands and seals in duplicate, the day and year above written. CHESAPEAKE & OHIO RAILWAY COMPANY. By C. W. HUNTER, Agent. [Seal.] J. A. HUGHES, Owner and Shipper. [Seal.]"

The court, having considered the case and the facts, and the law arising thereon, was of opinion that the plaintiff was entitled to recover the full amount claimed by him, $175, found for the plaintiff, and assessed his damages at said amount; and the defendant moved the court to set aside its finding because the same was contrary to the law and the evidence, which motion the court overruled, and the defendant excepted. The defendant also asked that a new trial be granted it, which the court refused. The defendant again excepted, which exceptions were properly saved to it, and judgment was rendered against the defendant for said amount; and from this judgment this writ of error was obtained.

Simms & Enslow, for plaintiff in error.

Vinson & McDonald, for defendant in error.

ENGLISH, J.—The question presented for our consideration and determination in this case is whether a railroad operating in this state, and carrying on business as a common carrier, can by a special contract made with a shipper of live stock fix the value of the property to be shipped, and ascertain beforehand the amount of damages that is to be paid in the event of the loss of the property, when the rates of charges for transportation are fixed by the same agreement in accordance with the value placed by the owner or shipper upon the animal shipped, or whether a shipper has a right to fix one value upon his property at the time he is making the shipment, in order to get the advantage of reduced rates, and place another value upon his property when he claims damages for its loss or destruction.

Question presented.

The portion of the agreement signed by the shipper which

is material in this case reads as follows; "The party of the second part further agrees, for the consideration aforesaid, that he will in no event hold the party of the first part responsible for any loss, damage, or injury whatever to said stock which may occur beyond its own line, and, in case of any loss or damage on its line for which the party of the first part may be responsible under this contract, such responsibility shall be and is hereby limited to $100 for each horse," etc., whether such loss or damage exceeds such sum or not." It appears from the agreed statement of facts that the freight train upon which the mare was shipped went through the Guyandotte bridge across Guyandotte river, and said mare was killed in the wreck between Huntington and Brownstown. Whether the wreck was the result of inevitable accident or negligence on the part of the defendant does not appear; but the rule has been laid down that where a loss of this character appears the presumption is that it was caused by negligence, and the burden of proof is on the defendant to show the contrary. For the purposes of this case then, we will consider it as if the loss of the mare was occasioned by the negligence of the defendant; and we find that this court in the case of Maslin *v.* Baltimore & O. R. Co., 14 W. Va. 180, (second point of syllabus,) has held that "a common carrier for hire, by special contract based on a valuable consideration, may exempt itself from loss or damage resulting from inevitable accident, though such accident was not the result of the act of God or of the public enemy, provided the common carrier or its servants in no manner contributed to such accident; but it cannot exempt itself from loss or damage which has in any degree been caused by the negligence or misfeasance of itself or its servants." That case was one in which a lot of cattle were shipped over the Baltimore & Ohio Railroad under a special contract, in which it was provided that in consideration of a reduced rate of charges the plaintiff assumed certain specified risks; that is, all and every risk of injuries which the animals or any of them might receive, in consequence of any of them being wild, vicious, unruly, weak, escaping, maiming, or killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects of being crowded on the cars, or on account of being injured by burning of hay or straw or other material used by the owner for feeding them or otherwise, and for any damage occasioned thereby, and also all risk of any loss sustained by reason of any delay, or for other causes or things in or incident to or from or in loading or unloading the cattle. And by said special agree-

Validity of agreement where loss resulted from negligence.

ment the plaintiff agreed to load and unload the cattle at his own risk, the defendant to furnish the necessary power to move the cars under the plaintiff's direction, who was to examine for himself, and see that they were of sufficient strength, of the right kind, and in good repair. And it was further agreed that under no circumstances should the defendant be responsible for injury to or loss of any single animal beyond $200, though its value might be more. And the plaintiff or his agent was to have a free passage on the cars, to take care and charge of the cattle, but at his own risk of personal injury from any cause. And the plaintiff released the defendant from all responsibility for losses before referred to, or from any other that might happen from mistakes or unavoidable accident in the transportation of the cattle. The weather was very warm, the cattle were placed in two cars and accompanied by plaintiff's agent; the cars were delayed, and two cattle died on the way from heat, and others were seriously injured.

The facts in the case under consideration are quite different. In this case the plaintiff, for the purpose of getting the benefit of reduced rates of carriage, fixed the value of his mare at $100, and paid in consequence $3.25 freight, whereas, if he had placed her at $175, he would have been required to pay $7; and he agreed that in case of loss or damage on the defendant's line, for which said company might be responsible under said contract, it should be limited to $100. Now under this contract, if the plaintiff was honest in fixing the value of the mare at $100, and agreeing to receive that amount in the case of a loss for which the defendant was legally liable, what unfairness or unreasonableness could there be in the contract. If the mare was lost, he would get the value fixed on her by himself; but if he fixed that value below the real value of the mare, for the purpose of enjoying the benefit of the reduced rates, would it be reasonable and right to allow him, when the loss occurs, to put a higher value on her, which he could have done at the time of shipment, and would no doubt have done if he had not wished to avoid the additional freight charge? As I understand this contract, it does not exempt the defendant railroad from liability, and such was not the intention of the parties thereto. It merely fixes the amount of liability which will be incurred in the event of loss, by placing a valuation on the property to be handled by the road. In the case of Maslin *v.* Baltimore & O. R. Co., *supra*, it will be noticed that the court held that the company could not exempt itself from loss or damage by special contract. It does not, however, hold that the ship-

Contract merely fixing amount of liability is valid.

per, by special contract with the railroad, cannot ascertain and fix the prospective liability of the road in case of loss by fixing a fair and honest valuation on the property.

In the case of Hart *v.* Pennsylvania R. Co., reported in 112 U. S. 331, 18 Am. & Eng. R. Cas. 604, will be found a case which bears a great similarity to the one at bar. In that case a party shipped five horses and other property by a railroad in one car, and under a bill of lading signed by him, which stated that the horses were to be transported upon the following terms and conditions, which are admitted and accepted by him as just and reasonable: First, to pay freight thereon at a rate specified, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding $200 each; if a chartered car, on the stock and contents in same $1,200 for the car load. But no carrier shall be liable for the acts of the animals themselves, nor for loss or damage arising from the condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." By the negligence of the railroad company or its servants, one of the horses was killed and the others were injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were race horses, and the plaintiff offered to show damages, based on their value, amounting to over $25,000. The testimony was excluded, and he had a verdict for $1,200. On a writ of error brought by him, held (1) the evidence was not admissible, and the valuation and limitation of liability in the bill of lading were just and reasonable, and binding on the plaintiff; (2) the terms of the limitation covered a loss through negligence. It was also held that "when a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation; even in case of loss or damage by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." And, in the course of his opinion delivered in that case, BLATCHFORD, J., says: "This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on

the assertion and agreement that its value is a less sum than that claimed after the loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume." The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. See, also, Greenh. Pub. Pol. p. 517, and the numerous authorities there cited in support of this doctrine.

Under the strict rules of the common law the liability of the common carrier is concisely stated by Hutchinson, in his valuable and exhaustive work on Carriers, as follows: "He is an insurer of the goods against all losses except those caused by the act of God, the public enemy, the law, the owner, or the inherent nature of the goods." And, if we treat the carrier as an insurer, it would surely be unreasonable to allow the shipper, at the time he is insured by placing his horse on the cars, to place one estimate on its value, and pay freight in accordance with that estimation, and when a loss occurs to come forward and claim his insurance in the shape of damages by placing another and higher valuation upon the property; and if there is any species of property about which men are disposed to differ, and differ honestly, it is in regard to the valuation placed upon horses from casual observation, and the ordinary railroad agent is not presumed to be capable of placing a proper estimate on the value of property of this character, even if he has an opportunity of inspecting it. So that for this reason, unless some value is allowed to be fixed upon the property offered for shipment, the carrier is liable to be subjected to a gross imposition by allowing the owner of a horse, the value of which can only be estimated by thousands of dollars, to avail himself of the advantage of low rates by placing a low estimate on said property, and in the event of a loss to claim and recover the true value.

The question of the liability of common carriers under similar circumstances was presented to the court of appeals of Virginia in the case of Richmond & D. R. Co. *v.* Payne, 86 Va. 481, 42 Am. & Eng. R. Cas. 366; and the rulings of the court in that case clearly draw the distinction between an agreement entered into between a common carrier and a shipper to exempt the carrier from liability for injury or loss occasioned by the neglect or misconduct of such carrier, and

a special agreement, in consideration of reduced rate of transportation, to limit his liability to a certain amount less than the value of the property in case of loss or damage occurring through his negligence. In that state there is a statute which provides that "no agreement made by a common carrier for exemption from liability for loss occasioned by his own neglect or misconduct shall be valid." But said court, in its opinion, after quoting said statute, says: "But that is not the question before us. The question here is whether, when the shipper signs a bill of lading not exempting the carrier from liability for the negligence of himself or his servants, but limiting the amount in which the carrier shall be liable in consideration of the goods being carried at reduced rates, such a contract, fairly entered into, is valid and binding; and we see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable?"

The contract between the carrier and shipper, in the case at bar, was that in consideration of the freight on said horse being fixed at $3.25 the responsibility of the carrier should be limited to $100 for the horse, and not that the carrier should be exempted from liability. Now it will be conceded that a common carrier, in receiving property for shipment, is entitled to a fair representation from the shipper as to the value of the property to be shipped, so that, being acquainted with the value of the article intrusted to his care, he may use care and vigilance commensurate with the risk he incurs. So, in the case of Muser *v.* American Express Co., 1 Fed. Rep. 383, (decided by the United States circuit court for the southern district of New York,) WALLACE, J., delivering the opinion, says: "The right of a carrier to exact fair information as to the value of the property confided to his care has always been recognized. He has a right to insist that his compensation be measured by his risk, and obviously the degree of care which he will exercise will measurably depend upon the extent of the responsibility he may incur," etc. And in the syllabus the court held that a "stipulation in a receipt limiting the liability of the carrier to a stated sum is binding upon the shipper, in the absence of a disclosure as to the real value of the goods shipped." And it may be noticed here that nothing in the case at bar shows that the defendant had any intimation that the horse shipped by the plaintiff for any reason exceeded in value the sum of $100.

The supreme court of Wisconsin, in the case of Black *v.* Goodrich Transportation Co., 55 Wis. 319, held that "it is well settled that the common carrier of persons or property

cannot by any agreement, however plain and explicit, wholly relieve itself from liability for injury resulting from its gross negligence or fraud," and that "it is also settled that in order to exempt the carrier from liability, or to limit the extent of its liability for injury caused by its own negligence of any kind, the contract must expressly so provide," and that "a contract providing that in case of loss the carrier shall be liable to pay as damages a specific sum will not, without an express stipulation to that effect, relieve the carrier from liability to the full amount of the goods lost through its negligence."

It is true that the supreme court of New York, in the case of Gould *v.* Hill, 2 Hill (N. Y.), 623, in 1842, held that "common carriers cannot limit their liability or evade the consequences of a breach of their legal duties, as such, by an express agreement or special acceptance of the goods to be transported." And Hutchinson on carriers, in discussing this point says: "A few years after this decision the very same question came before the supreme court of the United States in the case of New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, and the ruling in Gould *v.* Hill was disapproved; the court being unanimously of the opinion that a common carrier might, at least by special contract, restrict his liability. This decision was soon followed in the courts of New York, in which the decision in Gould *v.* Hill was abandoned as untenable; and the right of the carrier thus to limit his responsibility has ever since remained unquestioned in that state, and may now be stated as the well-settled law of our states as well as of the supreme court of the United States. The validity of such special contracts has indeed been nowhere denied, and the case of Gould *v.* Hill stands as the only reported case in which the right of the carrier to limit his liability in this way is held to be lawful.

It may therefore be stated as the universal law of this country that, in the absence of a statute prohibiting it, all common carriers may by express or special contract with their employer be exonerated from that rigorous rule of the common law which, in the absence of contract, makes them insurers of the safety of the goods intrusted to them." See, also, Ang. Carr. § 259, and also the case of Louisville & N. R. Co. *v.* Sherrod, 84 Ala. 178, 35 Am. & Eng. R. Cas. 611, where it was held that "a common carrier may by special contract limit his liability for loss of goods to an amount agreed on as the value, in consideration of a reduced rate of freight, provided no extortion or coercion is practiced or threatened, and no undue advantage taken of the ship-

per; but such special contract does not protect the carrier against liability for fraud, nor for intentional, wanton, or reckless negligence." So, also, in the case of Hill *v.* Boston, H. T. & W. R. Co., 144 Mass. 284, 28 Am. & Eng. R. Cas. 87, it appears that "cows belonging to A. were delivered to a common carrier by an agent of A., who was employed to attend to the care and transportation of the cattle, and who signed an agreement for their transportation by railroad, in which the value of each cow was estimated at a certain sum, and which provided that the owner of the cows should assume all risk of loss or damage from any cause except from collision of trains, in which case the carrier should not be held liable for a greater sum than that specified in the agreement; that the rates of transportation were based upon and intended only for cows of the value specified; and that an additional rate would be charged for cows of greater value. One of the cows was killed by the negligence of the carrier, and not by a collision of trains. *Held*, in an action by A. against the carrier, that he could recover only the value of the cow as expressed in the agreement, and that he was bound by the agreement made with his agent." See, also, Graves *v.* Lake Shore & M. S. R. Co., 137 Mass. 33, 16 Am. & Eng. R. Cas. 108, where the facts are similar and the same principal is announced; and while there is considerable conflict in the decisions the result of our examination has been that the great weight of authority is in favor of the principles announced in the decisions and authorities above quoted.

As we understand the ruling of this court in Maslin *v.* Baltimore & O. R. Co., *supra*, it was held in that case that "a common carrier for hire may by special contract, based on valuable consideration, exempt itself from loss or damage resulting from inevitable accident, though such accident was not the result of the act of God or of the public enemy, provided the common carrier or its servants in no manner contributed to such accident; but it cannot exempt itself from loss or damage which was in any degree caused by the negligence or misfeasance of itself or its servants." And our ruling in the case at bar is distinguished from the ruling in that case in this, that we here hold that "where a contract of carriage, signed by the shipper, is fairly made with a railroad company as a common carrier, and the valuation of the property shipped is agreed upon, and in consideration of the valuation so fixed a rate of freight is determined upon, on the condition that the carrier assumes liability to the extent of the agreed valuation, even in the case of loss by reason of *prima facie* negligence of the carrier the contract will be upheld as fixing the liability of the carrier in proportion to

the freight he receives, and protecting himself against extravagant valuations; and such a contract will not be upheld as exempting the carrier from all liability but as limiting the liability in case of loss to the amount fixed by agreement.

Having reached this conclusion the judgment complained of is reversed, the finding of the circuit court is set aside, and a new trial is awarded, with costs to the plaintiff in error.

BRANNON, J., (*concurring.*)—I concur in the decision in this case. To avoid misapprehension of my own views, I desire to say that the shipper may require the carrier to ship his his property under the imperative requirement of the law of the land, and pay the rate of freight prescribed by that law, and he cannot be compelled to sign any bill of lading or contract limiting the value of the property, or the amount of liability in case of loss. If, however, to obtain a lower rate, he choose to enter into a fair contract, limiting the liability, but not wholly exempting the carrier from liability for negligence, he is bound by his contract.

LUCAS, P., (*dissenting.*)—In the leading case of New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 35, Justice BRADLEY, in delivering the opinion of the court, said: "In regulating the public establishment of common carriers the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment; and to assert that he may do so seems almost a contradiction in terms. Now to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an ab-

stract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive to the very object of the law. It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in Dorr *v.* New Jersey Steam Navigation Co., 4 Sandf. (N. Y.) 136, the court sums up its judgment thus: 'To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals or conflicting with the public interests, would in my judgment be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right.' Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. * * * If the customer had any real freedom of choice, if he had a reasonable and practical alternative and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public.' But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public are compelled to accept. These circumstances furnish an additional argument, if any were

needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The *status* and relative position of the parties render any such condition void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable that the court sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident or dangers of navigation that no human skill or vigilance could guard against. It was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged unless apprised of their character or value. It was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers the law might well give effect to them, without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws have diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would have never been entertained by the sages of the law. * * * Conceding, therefore, that special contracts made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable, (to the extent, for example, of excusing for all losses happening by accident without any negligence or fraud on their part), when they ask to go still further, and to be excused for negligence,—an excuse so repugnant to the law of their foundation, and to the public good,—they have no longer any plea of justice or reason to support such a stip-

ulation, but the contrary; and then the inequality of the parties, the compulsion under which the customer is placed, and the obligation of the carrier to the public, operate with full force to divest the transaction of validity."

In the syllabus of that case it is said: "A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. It is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." It is further held in the same case, *arguendo*: "That a common carrier does not drop his character as such merely by entering into a contract for limiting his responsibility. That carefulness and fidelity are essential duties of his employment, which cannot be abdicated. That these duties are as essential to the public security in his servants as in himself."

In the same opinion, there is quoted with approval the following conclusion reached by Chief Justice Redfield in his American Railway Cases: "(1) That the exemption claimed by carriers must be reasonable and just; otherwise, it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. (2) That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages, resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and therefore based upon principles and a policy which the law will not uphold.

I have quoted at large from this opinion because, up to a very recent period, it settled the law upon this subject in the supreme court of the United States, and was relied upon as a leading authority by many of the state courts, and particularly by this, the highest tribunal of our own state.

In the case of Maslin *v.* Baltimore & O. R. Co., 14 W. Va. 180, a similar doctrine is laid down. In the second point of its syllabus, it is there said: "A common carrier for hire, by special contract, based on a valuable consideration, may exempt itself from loss or damage resulting from inevitable accident, though such accident was not the result of the act of God or of the public enemy, provided the common carrier or its servants in no manner contributed to such accident; but it cannot exempt itself from loss or damage which has in any degree been caused by the negligence or misfeasance of itself or its servants." In that case the contract was almost identical with the one we are now considering,

and was in like manner embraced in the printed bill of lading. The case of New York Cent. R. Co. *v.* Lockwood was cited approvingly and largely relied on by Judge GREEN in delivering the opinion. In the case of Brown *v.* Adams Express Co., 15 W. Va. 812, the same principles were reaffirmed after an exhaustive examination of the various authorities by the same eminent jurist, (Judge GREEN), who delivered the opinion.

Now these two cases, it was to be hoped, had definitely settled the law upon this subject in West Virginia. But unfortunately the supreme court of the United States has in a more recent case undertaken to vitalize these printed bills of lading into contracts as between parties on an equal footing, and to draw a distinction between limiting the liability of the common carriers and exempting them from such liability. In the case of Hart *v.* Pennsylvania R. Co., 112 U. S. 331, 18 Am. & Eng. R. Cas. 604, this distinction, entirely too refined for common sense to appreciate, was insisted upon. The facts and circumstances of that case are found in the opinion in the present case, concurred in by a majority of the court. The least that can be said about it is that, while it disclaims to overrule the case of Lockwood *v.* New York Cent. R. Co., yet it is, both in reasoning and principle, in direct conflict with the older decision. For example, by referring to the quotation which we have already made from the opinion of Justice BRADLEY, it will be seen that he expressly repudiates the idea that the parties are standing "upon a footing of equality," and that the contract can be construed as if made between private individuals. His language is, (our italics:) "*If the customer had any real freedom of choice*, if he had a reasonable and practical alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade had assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions upon travel and transportation as they see fit, *which the public are compelled to accept*." Compare this language with the following from Justice BLATCHFORD in Hart *v.* Pennsylvania R. Co., *supra*: "The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had

been told by the plaintiff the sum inserted in the contract. * * * The shipper is estopped from saying that the value is greater. The articles had no greater value, for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy." Why this reasoning as to a compulsory contract, contained in a printed bill of lading, should be applicable to a limitation, and not applicable to an exemption, from liability, it would puzzle the most ingenious mind to conjecture. If the carrier and the shipper stand upon equal terms, and can make a contract to restrict the liability of the former to the lowest limit of value, without any regard whatever to actual valuation, why cannot the same contracting parties make a contract for absolute exemption? In point of fact, to limit is to exempt *pro tanto*. When a printed valuation, as in this case, is set upon all horses shipped, without any regard for actual value, and the horse is killed by the negligence of the carrier, does not the carrier, by reason of this so-called contract, exempt himself from liability so far as the true value of the horse may prove to be above the artificial printed valuation of the bill of lading, which is fixed by the company, and to which the shipper must submit or not ship at all?

But, so far as the law of this state is concerned, we are not left to inference or conjecture as to what our conclusion should be. In the case of Brown *v.* Express Co., *supra*, the question was not one of exemption alone, but of limitation, also; and this court expressly held that the common carrier could not by such a contract limit its liability, just as it had previously held, in the case of Maslin *v.* Baltimore & O. R. Co., that it could not exempt itself. The syllabus of the former case is as follows: "(3) A common carrier cannot limit his common-law responsibilities by any general notice, though knowledge of such general notice be brought home to the consignor before or at the time he applied to have his goods transported. (2) A common carrier does not, by limiting his common-law liabilities by special contract, thereby become a private carrier; and if loss is sustained the burden of proof is on him to show, not only that such loss arose from a cause from which he was exempted from responsibility by the terms of his special contract, but also that it arose from no negligence or misfeasance of himself or his servants." In this case, Judge GREEN especially repudiates much of the authority relied on to support the view

of the supreme court in Hart *v.* Pennsylvania R. Co., and disposes of the Pennsylvania cases relied upon by simply saying that they "are not good law." 15 W. Va. 817, 818. In the present case, Brown *v.* Adams Express Co., is not even referred to in the opinion of the learned judge, concurred in by the majority, and must have been overlooked. Upon examining it, it will be found that it thoroughly disposes of the ingenious effort of the more modern jurists to distinguish between limitation of liability on the part of the common carrier and entire exemption. Upon looking at the bill of lading in the case of Hart *v.* Pennsylvania R. Co., it will be found that it limits the value of horses to $200, and the limitation of time within which suit shall be brought by the shipper to sixty days; and this contract was upheld by the supreme court because its terms were held to be "reasonable." In the bill of lading before us the value of horses is fixed at half that amount, or $100, and the shipper is limited in his right of action to ten days, or one-sixth of the time specified in the former bill of lading. By the decision from which I dissent, we have expressed the opinion that a horse reasonably worth $200, if offered at any point for transportation on the Pennsylvania Railroad, is reasonably worth only $100 if offered for transportation on the line of the Chesapeake & Ohio Railroad Co., and that sixty days being a reasonable limitation of time in the state of Massachusetts, it logically follows that ten days is a reasonable limitation of the right of action in West Virginia.

Upon the whole, I think it preferable to adhere to our own landmarks as established by our predecessors, rather than to subvert them by following the decisions of other co-ordinate tribunals, however eminent and respectable. And, as for the recent decisions quoted from the state of Virginia, I much prefer to follow the case of Railroad Co. *v.* Sayers, 26 Grat. (Va.) 328, which holds that: "(2) But a railroad company cannot by express contract, though upon the consideration of a reduced charge upon the freight, relieve itself from its liability, as carrier of the freight, for injury to or loss of the freight resulting in any degree from the want of care or faithfulness of themselves or their agents." In Maslin *v.* Baltimore & O. R. Co., this Virginia case was cited and relied upon; and I prefer to adhere to it rather than to adopt the somewhat erratic course of decision upon these subjects which characterizes the court of appeals of Virginia as now constituted.

Carriers—Limitation of Liability by Stipulation for Agreed Valuation—Validity of Agreement.—For a discussion of this subject see Louisville & N. R. Co. *v.* Sowell (Tenn.) *ante*, p. 166, and cases cited in note, 169.

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——to selectmen to carry out order of commissioners. Commissioners' decision cannot be reviewed on application for. Doolittle *v.* Selectmen T. of B. (Conn.), 279.

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Town authorities held bound to take notice of contents of decision of railroad commissioners. They cannot allege ignorance in *mandamus* proceedings to enforce order. Doolittle *v.* Selectmen T. of B. (Conn.), 279.
Municipal Regulations.
City may pass ordinances regulating use of streets provided they do not unreasonably interfere with legislative franchises. Allen *v.* Mayor (N. J.), 289.
Ordinances prohibiting digging up of street except by permission of aldermen, as applied to company laying track across street within located right of way, held invalid. Allen *v.* Mayor (N. J.), 289.
Power to cross streets is given to company by its charter power to locate its road between designated termini. Allen *v.* Mayor (N. J.), 289.
Negligence Generally.
Evidence that engineer or fireman did not watch, and that no one was on rear end of tender of backing locomotive. Clampit *v.* Chicago, S. P. & K. C. R. Co. (Iowa), 468.
Existence of highway at crossing where injury occurred. Competency of evidence to show that company could not have been ignorant. Delaware, L. & W. R. Co. *v.* Converse (U. S.) 323.
Failure of those in charge of train to discover traveler's danger and avoid collision may impose liability although traveler was negligent in failing to look. Cahill *v.* Cincinnati, N. O. T. P. R. Co. (Ky.), 390.
Flying switches across highway at night time without warning held to be negligence as a matter of law. Delaware L. & W. R. Co. *v.* Converse (U. S.), 323.
Footpath over railroad; when company will be presumed to assent to use of, and to give persons crossing track a license. Clampit *v.* Chicago, S. P. & K. C. R. Co. (Iowa), 468.
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Negligence Generally—*Continued.*
Footway over railroad; person crossing track at held not to be a trespasser and entitled to recover for injuries resulting from company's negligence. Clampit *v.* Chicago, S. P. & K. C. R. Co. (Iowa), 468.
Horses becoming unmanageable and running on track; instruction as to liability of company properly refused as misleading. Illinois C. R. Co. *v.* Slater (Ill.), 480.
"Public crossing;" allegation in petition held not to restrict plaintiff to proof that place was public highway. Evidence that it was used by footmen. Clampit *v.* Chicago, S. P. & K. C. R. Co. (Iowa), 468.
Right of engineer to presume that team approaching track would stop; refusal of instruction affirming, not erroneous; question for jury. Illinois C. R. Co. *v.* Slater (Ill.), 480.
Running and operation of engine; instruction not construed to mean that engine was run negligently where jury was charged that they must find negligence. Clampit *v.* Chicago, S. P. & K. C. R. Co. (Iowa), 468.
Trespasser on track; company not relieved from duty to exercise care to prevent injury. Clampit *v.* Chicago, S. P. &. K. C. R. Co. (Iowa), 468.
Defective Crossings.
Farm crossing; agreement of company to provide suitable crossing held to impose duty to an employe of a subsequent purchaser of the farm to keep such crossing in repair. Stewart *v.* Cincinnati, W. & M. R. Co. (Mich.), 456.
——instruction assuming obligation of company to maintain bridge at held to be erroneous. Stewart *v.* Cincinnati, W. & M. R. Co. (Mich.), 456.
——Recognition of crossing by company. Evidence as to instructions given as to repairs in connection with proof of repairs held admissible. Stewart *v.* Cincinnati, W. & M. R. Co. (Mich.), 456.

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Notice to company of condition of crossing not prerequisite to its liability for injuries sustained thereby. Stewart *v.* Cincinnati, W. & M. R. Co. (Mich.), 456.
Statute rendering company liable without proof of negligence; right of company to show that injury resulted from other causes than its negligence, including plaintiff's negligence; McKelvy *v.* Burlington, C. R. & N. R. Co. (Iowa), 477.
Signals.
Evidence as to whether bell was rung; witnesses may testify that they would have heard bell if it had been rung. Illinois C. R. Co. *v.* Slater (Ill.), 480.
Private crossing; persons using, in vicinity of public crossing, are entitled to benefit of signals required to be given at the latter. Cahill *v.* Cincinnati, N. O. T. P. R. Co. (Ky.), 390.
Speed.
Abandonment of ordinance regulating speed not shown by fact that company had not been prosecuted for violations. Cleveland, C. C. & I. R. Co. *v.* Harrington (Ind.), 358.
Admission of watchman at crossing that at time of accident train was going at certain speed held admissible to impeach his credibility. Delaware, L. & W. R. Co. *v.* Converse (U. S.), 323.
Approaching team; when negligence for train of cars to approach crossing at usual speed. Illinois C. R. Co. *v.* Slater (Ill.), 480.
Contributory negligence of traveler. Effect of negligence of company in running at excessive speed. See CONTRIBUTORY NEGLIGENCE, *post.*
Locomotive running backwards at high rate of speed; engineer failing to look out or to ring bell held to show negligence. Clampit *v.* Chicago, S. P. & K. C. R. Co. (Iowa), 468.
Ordinance limiting speed not rendered invalid by fact that company's charter gave it power to regulate speed. Cleveland, C. C. & I. R. Co. *v.* Harrington, (Ind.), 358.
Ordinance limiting speed of trains in cities to four miles an hour held reasonable. Cleveland, C. C. & I. R. Co. *v.* Harrington (Ind.), 358.
Frightening Horses.
Escape of steam; failure of company to use "muffler" held not to render liable for injuries caused by horses becoming frightened. Duvall *v.* Baltimore & O. R. Co. (Md.), 313.
—— from automatic safety valve; company not liable for injuries to traveler whose horse was frightened by. Duvall *v.* Baltimore O. R. Co. (Md.) 313.
Contributory Negligence.
Allegation in petition as to defendant's negligence held sufficient to admit proof of negligence in running train. Gratiot *v.* Missouri P. R. Co. (Mo.) 398.
Circumstances attending injury and fact that person injured stopped and looked, held to show absence of contributory negligence. Clampit *v.* Chicago, S. P. & K. C. R. Co. (Iowa) 468.
Evidence as to manner in which plaintiff has crossed track a few hours before accident is incompetent to show negligence. Delaware L. & W. R. Co. *v.* Converse (U. S.) 323.
Exposure of person to save life of child which had fallen on track held not contributory negligence. Pennsylvania Co. *v.* Langendorff (Ohio) 317.
Failure of person to use his senses to discover train is contributory negligence which bars recovery. Louisville & N. R. Co. *v.* Webb (Ala.) 427.
Failure of traveler to look both ways constantly, not contributory negligence. Gratiot *v.* Missouri P. R. Co. (Mo.) 398.
Failure to look and listen. Fact that company's watchman failed to do his duty and warn traveler as well as fact that train was running at excessive speed does not make the case one for the jury. Louisville & N. R. Co. *v.* Webb (Ala.) 427.
Failure to look; attempting to

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cross track while train, which had just passed was backing, held to be negligence precluding a recovery. Marks' Adm'r *v.* Petersburg R. Co. (Va.) 418.
Failure to look; evidence that person in another vehicle immediately behind plaintiff looked and could not see train held admissible. Cahill *v.* Cincinnati, N. O. T. P. R. Co. (Ky.) 390.
Failure to look. Right of person injured to rely on absence of flagman and want of any danger signal. Finding that deceased was not negligent not disturbed. Richmond *v.* Chicago & W. M. R. Co. (Mich.) 367.
Failure to look; where there is absence of direct testimony on this point jury are to determine question from circumstances; there is no presumption that traveler was reckless. Cahill *v.* Cincinnati N. O. T. P. R. Co. (Ky.) 390.
Failure to look where train could have been seen is such negligence as will preclude a recovery irrespective of any negligence on the part of the company. Grostick *v.* Detroit L. & N. R. Co. (Mich.) 332.
Failure to look will not excuse company where those in charge of train could have discovered danger and could have avoided collision. Cahill *v.* Cincinnati N. O. T. P. R. Co. (Ky.) 390.
Findings of jury on issues of contributory negligence not disturbed where the evidence was conflicting and where the court gave proper instructions. Delaware L. & W. R. Co. *v.* Converse (U. S.) 323.
Greater rate of speed than that allowed by city ordinance held negligence *per se* and direct cause of injury to person killed at crossing. Gratiot *v.* Missouri P. R. Co. (Mo.) 398.
Imputed negligence of driver of vehicle not imputed to one accepting his invitation to ride therein. Cahill *v.* Cincinnati N. O. T. P. R. Co. (Ky.) 390.
Imputed negligence; negligence

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of husband not imputed to wife riding with him over crossing. Louisville N. A. & C. R. Co. (Ind.) 451.
Instruction as to traveler's duty in approaching crossing and care required held to be sufficient. Gratiot *v.* Missouri P. R. Co. (Mo.) 398.
Looking and listening; court cannot fix exact point at which this duty must be exercised; ordinary care required. Cleveland C. C. & I. R. Co. *v.* Harrington (Ind.) 358.
Mistaken belief of traveler that engine which he sees at a distance is standing on side track. Question of contributory negligence held to be for jury. Gratiot *v.* Missouri P. R. Co. (Mo.) 398.
Partial blindness will not excuse exercise of care but imposes duty of greater precaution. Marks' Adm'r *v.* Petersburg R. Co. (Va.) 418.
Questions of law and fact. Court did not err in leaving question of plaintiff's negligence in failing to take proper precautions to the jury. Cleveland C. C. & I. R. Co. *v.* Harrington (Ind.) 358.
Traveler may presume that company will obey ordinance regulating speed of trains. His negligence is to be judged in the light of this presumption. Cleveland C. C. & I. R. Co. *v.* Harrington (Ind.) 358.
Wrongful conduct of company in violating ordinance regulating speed will not excuse traveler from exercise of care. Cleveland C. C. & I. R. Co. *v.* Harrington (Ind.) 358.
Farm Crossings.
Action to enjoin land owner from crossing track held to be a suit to determine legal right of company to close crossing within meaning of statute. New York & N. E. R. Co. *v.* Comstock (Conn.) 295.
Defective farm crossing; injuries at. See *Defective crossing, ante.*
Land owner cannot demand that railroad keep open farm crossing

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although it has done so for severalyears, and such crossing did not interfere with its use of the right of way. New York & N. E. R. Co. *v.* Comstock, (Conn.) 295.
Landowner whose farm is divided by railroad is entitled to necessary crossing; duty to keep gates closed. Adams *v.* Atchison T. & S. F. R. Co. (Kan.) 579.
Mandamus lies to compel construction of, although statute imposes penalty for failure of company to make proper crossings. State *v.* Chicago M. & N. R. Co. (Wis.) 304.
Railroad company has right to exclusive use of its right of way. New York & N. E. R. Co. *v.* Comstock (Conn.) 295.
Signals; person at private crossing who has been accustomed to hear signals given for neighboring public crossing may rely upon their being given in using private way. Cahill *v.* Cincinnati N. O. T. P. R. Co. (Ky.) 390.
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Statute requiring particular company to keep watchman at particular crossing is valid. Kentucky C. R. Co. *v.* Commonwealth (Ky.) 312.
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Excessive damages. Verdict for $10,175 for personal injuries held not excessive. Gratiot *v.* Missouri P. R. Co. (Mo.) 398.
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Interest; jury may allow, in action against carrier for injury to live stock. Ft. Worth & D. C. R Co. *v.* Greathouse (Tex.), 157.
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—— on damages for property destroyed by fire; owner held entitled to recover. Regan *v.* NewYork & N. E. R. Co.(Conn.), 590.
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Personal injuries; several items of damage; presumption that there was no finding on one item for more than the item claimed. Clampit *v.* Chicago S. P. & K. C. R. Co. (Iowa), 468.
DEATH.
Abatement of action for injuries resulting in death where there is no widow or next of kin to receive benefit; statute construed. East Tenn. V. & G. R. Co. *v.* Lilly (Tenn.), 495.
Allegation that injuries were "willfully" inflicted; no recovery had on proof of mere negligence. Birmingham M. R. Co. *v.* Jacobs (Ala.), 263.
Damages limited to present worth of decedent's life to his estate; what should be considered in estimating damages. Wheelan *v.* Chicago M. & St. P. R. Co. (Iowa), 693.
—— limited to pecuniary injury sustained by persons entitled to share in distribution. Richmond *v.* Chicago & W. M. R. Co. (Mich.), 367.
Distribution of personal estate governed by statute existing at time of death of intestate. Richmond *v.* Chicago & W. M. R. Co. (Mich.), 367.
Expectancy of life. Where deceased was nineteen it was error to permit his expectancy at twenty-one to be shown. Wheelan *v.* Chicago, M. & St. P. R. Co. (Iowa), 693.
Two brothers killed in same collision; judgment in action for death of one when not a bar to action for death of the other. Illinois C. R. Co. *v.* Slater (Ill.), 480.
"Willful injuries." Allegation as to running one train into another at a crossing not equivalent to an averment that injuries were willfully caused. Birmingham M. R. Co. *v.* Jacobs (Ala), 263.
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meaning of statute requiring trains to stop within one hundred feet of crossing. Birmingham M. R. Co. *v.* Jacobs (Ala.), 263.
EMINENT DOMAIN.
Appeal by land owner from award of commissioners deprives condemning company of right to appropriate land until appeal has been determined. Jersey C. N. & W. R. Co. *v.* Central R. (N. J.), 256.
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Verdict of jury which tries appeal from award of commissioners fixes conclusively the compensation so as to give condemning party right to appropriate property. Jersey C. N. & W. R. Co. *v.* Central R. Co. (N. J.), 256.
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Carriers; estoppel of shipper to recover higher valuation than that fixed. See CARRIERS, *limitation of liability.*
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Circumstantial evidence; charge of court with reference to weight and value of, held not erroneous. Wheelan *v.* Chicago, M. & St. P. R. Co. (Iowa), 693.
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Common law rule as to domestic animals is in force and every one must keep his stock on his own premises. Bostwick *v.* Minneapolis & P. R. Co. (N. Dak.), 527.
Contract to maintain cattle guards held not a contract "not to be performed within one year" within meaning of statute of frauds. Arkansas M. R. Co. *v.* Whitley (Ark.), 587.
Duty to fence; company not relieved from liability for killing stock at point where its road was the center one of five parallel tracks, although there was not sufficient room to fence. Kelver *v.* New York C. & St. L. R. Co. (N. Y.), 551.
Fencing track where it is not required by statute owner of animals cannot rely on fact that right of way was not sufficiently enclosed. McMaster *v.* Montana U. R. Co. (Mont.), 564.
Gates at farm crossing; neglect of land owner to keep closed, defeats recovery for injury to stock thereby going on track. Adams *v.* Atchison T. & S. F. R. Co. (Kan.), 579.
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Appliances. When railroad company is liable for failure to adopt improved appliances. Hagen *v.* Chicago D. & C. G. T. J. R. Co. (Mich.), 670.
Attorney's fee; where plaintiff desires to recover he should demand same with petition; submission of question to jury. Ft. Scott, W. & W. R. Co. *v.* Tubbs (Kan.), 685.
Combustible material on right of way charged as negligence; finding of jury that engine was defective; finding and verdict held in accord with allegations. Ft. Scott, Wichita & W. R. Co. *v.* Tubbs (Kan.), 685.
Combustible material on right of way; construction of statute imposing liability on company where fire is caused by. Spencer *v.* Montana Central R. Co. (Mont.), 678.
Company operating railroad owned by another company; liability for damages caused by fires whether possession is legal or illegal. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
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—— failure to take precautions against negligence of defendant is not. Ft. Scott, W. & W. R. Co. *v.* Tubbs (Kan.), 685.
—— Negligence of third person in permitting accumulation of trash near his buildings is no defence. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
—— Negligence of town authorities in allowing accumulation of combustible material in streets is no defence. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
Damages for burning meadow are such as to compensate owner for actual loss; jury may consider difference in value of land. Ft. Scott, Wichita & Western R. Co. *v.* Tubbs (Kan.), 685.
—— Interest on value of property from date of destruction; owner entitled to recover, in addition to value of property. Regan *v.* New York & N. E. R. Co. (Conn.), 590.
—— Interest on value of property from time of destruction should be allowed. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
—— Just compensation in money for property destroyed is proper measure; inquiry confined to value of property with interest thereon. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
—— Where property destroyed has no market value evidence is admissible to establish its real value. What facts jury may consider. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
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—— Hearsay evidence as to origin of fire consisting of declaration of stranger is admissible. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
—— of former fires set out by same engine is admissible; but evidence of fires set out by other locomotives is not admissible. Jacksonville T. &. K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
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—— mere emission of sparks or setting out fire does not raise, but if emission is unusual in size and quantity of sparks, the rule is otherwise. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
—— Where evidence in rebuttal shows that engine was in proper order and properly managed the testimony is irreconcilable, and a finding of negligence by the jury will not be disturbed. Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co. (Fla.), 603.
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—— between connecting lines. To what extent a railroad company may prefer itself over connecting line and how far it may refuse to recognize through tickets. Little Rock & M. R. Co. *v.* East T., V. & G. R. Co. (C. C.), 23.
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